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Supreme Court, U.S.
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No. 86-

In The
Supreme Court of the United States

October Term, 1986

WHITE MOUNTAIN APACHE TRIBE, et al.,

Petitioners,

v.

JACK WILLIAMS, et al.,

Respondents.

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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QUESTIONS PRESENTED

1. Whether an Indian tribe's rights and privileges of immunity from state taxes that interfere with federal Indian timber laws, as upheld in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), are nevertheless not "rights, privileges, or immunities secured by the Constitution and laws" entitled to the remedies of 42 U.S.C. § 1983, including attorneys' fees under 42 U.S.C. § 1988. This includes the following subsumed questions:

(a) Whether a claim of right under federal law, vindicated and enforced in fact by the United States Supreme Court, is necessarily a right, privilege, or immunity within the meaning of 42 U.S.C. §§ 1983 and 1988.

(b) If not, then whether the federal Indian timber laws, 25 U.S.C. §§ 196, 406, 407, 466, and 476 and 25 C.F.R. Parts 141 and 142, create rights in the Indians which are enforceable against the states, as they are against the United States (*United States v. Mitchell*, 463 U.S. 206 (1983)).

(c) Whether the federal rights of Indians to be left alone by state governments are civil rights.

2. Whether the rule in *Maher v. Gagne*, 448 U.S. 122 (1980), that § 1988 attorneys' fees may be awarded to prevailing plaintiffs in § 1983 actions involving unresolved constitutional claims unless the claims are "inescapably . . . frivolous" shall be replaced by a rule that such unresolved claims must have sufficient "merit."

3. Whether the due process and equal protection concerns of the dissenters in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 158 and n.7 (1980), are "inescapably . . . frivolous" under the *Maher* test or otherwise lack sufficient "merit" under the new Ninth Circuit test.

4. Whether a defendant's avowal, only after losing his case in the Supreme Court, that he now intends to abide by that adverse decision precludes the district court from giving any final injunctive or declaratory relief.

LIST OF PARTIES

The parties to the proceedings below were the White Mountain Apache Tribe; Basin Building Materials Co. and E.H. Loveness Lumber Sales Co., Oregon corporations doing business as "Pinetop Logging Company"; the State of Arizona, Arizona Highway Department; Jack Williams, (former) Governor of the State of Arizona; John McLaughlin, Chairman, Arizona State Transportation Board; Robert R. Evans, Vice-Chairman, Arizona State Transportation Board; Ralph A. Watkins, Jr., Lawrence M. Hecker, Rex L. Martin, Hal Butler, and Lynn Sheppard, members, Arizona State Transportation Board; William A. Ordway, Director, Arizona Department of Transportation; and Phillip Thorneycroft, Assistant Director, Arizona Department of Transportation, Motor Vehicle Division.

Pinetop Logging Company has no parent, affiliate, or subsidiary corporations to be listed under Rule 28.1.

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**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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Petitioners WHITE MOUNTAIN APACHE TRIBE and PINETOP LOGGING COMPANY respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled proceeding.

OPINIONS BELOW

The [Second] Amended Opinion and Dissenting Opinion of the Court of Appeals for the Ninth Circuit filed August 20, 1986, are reported at 798 F.2d 1205 and reprinted in the Appendix hereto at pages A-1 through A-49, *infra*. The Court of Appeals' [First] Amended Opinion and Dissenting Opinion (A-57 through A-93) filed December 19, 1985, were reported at 778 F.2d 1332 (advance sheets, withdrawn from bound volume) and remain available on Westlaw. The Court

of Appeals' original Opinion and Dissenting Opinion (A-99 through A-123), filed February 7, 1984, are unpublished.

The District Court's Permanent Injunction and Declaratory Judgment and Order Awarding Attorneys' Fees (A-125 through A-127) filed March 11, 1981, Order Amending Judgment (A-128) filed April 6, 1981, and Findings of Fact and Conclusions of Law on Plaintiffs' Motion for Award of Attorneys' Fees Pursuant to 42 U.S.C. § 1988 (A-129 through A-134) filed March 11, 1981, are unreported.

JURISDICTION

The original judgment and Opinion of the Court of Appeals were entered on February 7, 1984. A timely Petition for Rehearing and Suggestion of Rehearing *En Banc* was filed on February 21, 1984. The Court of Appeals panel granted the Petition for Rehearing on April 25, 1984. The [First] Amended Opinion and Dissenting Opinion of the Court of Appeals were entered on December 19, 1985. A timely Petition for Rehearing and Suggestion of Rehearing *En Banc* was filed on January 9, 1986 (the time having been extended by the Court of Appeals). The [Second] Amended Opinion and Dissenting Opinion were filed on August 20, 1986. The order of the Court of Appeals denying further rehearing and rejecting rehearing *en banc* (A-51) was entered August 20, 1986. This petition for writ of certiorari is filed on November 17, 1986, within ninety (90) days of August 20, 1986.

This Court has jurisdiction to review the judgment of the Court of Appeals for the Ninth Circuit under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The constitutional provisions, statutes, and regulations involved, which are set out verbatim at A-167 through A-181, *infra*, are: United States Constitution, Art. I Sec. 8, Art. IV Sec. 3, Amendment XIV Secs. 1 and 5; 42 U.S.C. §§ 1983 and 1988; 25 U.S.C. §§ 196, 406, 407, 466, and 476; 25 C.F.R. Parts 141 and 142; Amended Constitution and Bylaws of the White Mountain Apache Tribe of the Fort Apache Indian

Reservation, Arizona (Excerpts); Ariz. Rev. Stat. § 28-1551 (1985 Supp.), former Ariz. Rev. Stat. § 28-1552 (1979 Supp.), former Ariz. Rev. Stat. § 28-1556 (1979 Supp.), former Ariz. Rev. Stat. § 40-601 (1964), and former Ariz. Rev. Stat. § 40-641 (1979 Supp.).

STATEMENT OF THE CASE

A. Earlier Proceedings in This Court and in the District Court.

This petition seeks review of the Ninth Circuit's divided decision reversing an award of \$206,012.07 in attorneys' fees, as well as declaratory and injunctive relief, to the prevailing parties in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). *Bracker* struck down Arizona gross receipts and motor fuel taxes assessed against a non-Indian logger for hauling tribal timber to the tribal sawmill as violating federal laws that regulate Indian timber to assure that the Indians receive the entire benefit of the forest. 448 U.S. at 147, 149.

In 1968, Pinetop Logging Company began logging for the White Mountain Apache Tribe's timber enterprise. In 1971, Arizona decided to disregard a 1968 agreement that it lacked jurisdiction to tax Pinetop and assessed "back taxes" on motor fuel use and gross receipts. Pinetop then paid one month's taxes under protest and filed a refund action in the Arizona superior court on December 8, 1971.

Arizona initially agreed not to press collection of the back taxes while the refund suit proceeded. In 1973, Arizona abandoned its agreement and threatened to summarily execute upon Pinetop's logging equipment for the back taxes, which would have largely shut down the Tribe's logging enterprise. The White Mountain Apache Tribe then filed this action in the United States District Court for the District of Arizona to enjoin collection of the 1968-1971 taxes, with jurisdiction under 28 U.S.C. §§ 1331, 1337, and 1343(3) and (4). At the same time the Tribe assumed the financial burden of the litigation and of the protest tax payments. The District Court entered a temporary restraining order on December 13, 1973. On January 14, 1974, Judge Walter E. Craig orally granted the state's Motion for Abstention on the

condition that Arizona consent to continuation of the temporary restraining order, which it did.

Thereafter, the White Mountain Apache Tribe joined in February 1974 as an additional plaintiff in the state court refund suit. The Arizona superior court rejected the Tribe's federal claims to immunity from the state taxes, and the Arizona Court of Appeals affirmed. *White Mountain Apache Tribe v. Bracker*, 120 Ariz. 282, 585 P.2d 891 (App. 1978). The Arizona Supreme Court denied review.

This Court granted certiorari and reversed the Arizona court judgments on June 27, 1980, holding the disputed gross receipts and diesel fuel taxes violative of federal regulation of Indian timber. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980).

Technically, the state court tax refund action that reached this Court adjudicated only the Tribe and Pinetop's right to refund of taxes paid under protest after November 1971. The disputed back tax assessments from 1968 through October 1971 were subject only to the jurisdiction of the District Court and were not technically encompassed within the causes of action adjudicated by the Supreme Court in the tax refund action. Ariz. Rev. Stat. §§ 28-1585(A) and 40-648(A). The Tribe and Pinetop therefore sought to conclude the federal District Court action with declaratory and injunctive relief against further assertion of the illegal taxes.

Since substantial attorneys' fees were incurred in both the federal District Court action and the state court tax refund action that reached the Supreme Court, the Tribe and Pinetop preferred to submit a single attorneys' fees request to one court to avoid duplicative expense. A unitary fee request was presented to the United States District Court, which was the Tribe's forum of first choice.

The District Court granted summary judgment for declaratory and injunctive relief, noting that Arizona had "vigorously resisted the plaintiffs' claims until the decision of the Supreme Court of the United States issued June 27, 1980" and that the defendants had "twice tried to have the preliminary injunction lifted in this Court in contravention

of the stipulation they entered into with the plaintiffs." (A-130.)

The District Court further found, "This action arises under 42 U.S.C. § 1983" (A-131) and, "As a matter of discretion and for the purpose of judicial economy the Court concludes that the plaintiffs' entire claims for attorneys' fees in all aspects, state and federal, of this litigation to date are to be determined in a single proceeding by this Court. . . ." (A-133.)

Attorneys' fees were awarded in the amount of \$206,012.07.

B. Proceedings in the Court of Appeals for the Ninth Circuit.

1. Rights Under the Federal Indian Timber Laws.

Arizona appealed, aided by 39 states as *amici curiae*. Its Appellants' Opening Brief offered no Question Presented or argument questioning the substantive correctness of the District Court's permanent injunction and declaratory judgment. Its Opening Brief did raise, for the first time on appeal, a wholly new contention that the Tribe had no "rights" under the federal Indian timber laws.

The Ninth Circuit handed down its first Opinion and Dissenting Opinion on February 7, 1984. The majority opinion by Judge Norris, joined by District Judge James M. Burns of the District of Oregon, addressing the question that Arizona had not preserved in the District Court but urged for the first time on appeal, held the Tribe's immunity from the disputed state taxes not to be a right, privilege, or immunity because the federal Indian timber laws were not intended by Congress "for the special benefit" of the Indians. (A-111.)

Somewhat contradictorily, the panel majority also acknowledged "that Congress intended in passing the statutes to promote Indian self-government, tribal economic activities, and reservation environmental, aesthetic, ecological and safety goals." (A-113.) Finally, the Ninth Circuit majority rejected the claim to § 1983 remedies for interfer-

ence with the Tribe's right of self-government of the timber resource precisely because:

[S]tatutes recognizing the right of tribal self-government represent, of course, *an entitlement to special treatment*, a right to be governed outside our laws, state or federal. *At the heart of § 1983 is the right to equal, rather than special, treatment.* It strikes us that it would be paradoxical to conclude that a § 1983 cause of action is available to enforce the right to be treated *differently* from others by virtue of a right of self-government. (A-116; emphasis added.)

Thus, the dilemma was complete: the Tribe was disqualified from §§ 1983 and 1988 remedies, first, because it is not "specially benefitted" by the federal timber laws and, second, because they represent "an entitlement to special treatment."

Judge Ely dissented. (A-118 through A-123.) In addition to the plain language of the *Bracker* opinion, he relied on the statutes, regulations, and case authorities which for nearly a century made clear that the Indian timber laws specially benefit the Indians and therefore satisfy the panel majority's test for § 1983 remedies.

The original panel granted rehearing on April 25, 1984. Judge Ely passed away after the second argument on rehearing, and Judge Fletcher was drawn to replace him on the panel. The [First] Amended Opinion of December 19, 1985, and the [Second] Amended Opinion of August 20, 1986, again reject the Tribe's claim for attorneys' fees. Judge Fletcher dissented. (A-23 through A-49.) The panel majority seems to concede, "that the Tribe benefits from the federal timber regulations" (A-5) and acknowledges, "Indeed it may have been so designed." (A-12.) However, the panel majority now abandons "whether the regulatory scheme was designed to benefit the Indians" as the "relevant focus of inquiry." (A-12.)

The majority holds "that § 1983 was not intended to encompass those Constitutional provisions which allocate power between the state and federal government" (A-7) and

that “preemption of state law under the Supremacy Clause — at least if based on federal occupation of the field or conflict with federal goals — will not support an action under § 1983.” (A-9.) Though federal Indian timber laws benefit the Indians, the timber laws create no “individual or tribal rights” since their concern is with protecting “the free exercise of authority by federal officials.” (A-13.)

Though the panel majority had earlier seemed to acknowledge that the Arizona taxes “conflict with the federal laws regulating the Tribe’s harvest and sale of reservation timber” (A-113), it now held that “the Arizona tax does not directly violate any federal law or regulation,” and “no federal statute or regulation was violated by the Arizona tax on Pinetop’s logging operation.” (A-10.)

The linchpin of the panel majority’s holding appears to be that the Indian timber laws create no rights in the Indians, no affirmative causes of action, but merely raise a “federal defense” to state tax collection:

To be sure, the Supremacy Clause shielded the Tribe’s timber business from state taxation, *giving the Tribe a federal defense to any action brought by the state to collect the taxes; it does not follow, however, that in enacting the regulatory legislation, Congress intended to confer on the Tribe the right to use § 1983 as a sword to enjoin the collection of state taxes.* (A-14; emphasis added.)

This central holding is contradicted by the fact that *Bracker* itself was not an “action brought by the state to collect the taxes” but an action by the Tribe and Pinetop against the state. This holding also overlooks well-settled law that Indian tribes do have private rights of action under preemptive federal law for their benefit to remedy, including enjoining, unlawful state taxes.¹

¹ *E.g., Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980).

2. Unadjudicated Constitutional Claims.

A plaintiff who prevails on a non-fee claim in a case with unadjudicated fee claims arising out of the same nucleus of operative facts is entitled to a fee award pursuant to § 1988 as long as the unadjudicated fee claims are "substantial." *Maher v. Gagne*, 448 U.S. 122 (1980). A claim is "insubstantial" only if it is "obviously frivolous" or "obviously without merit" or "inescapably . . . frivolous." *Hagans v. Lavine*, 415 U.S. 528, 536-38 (1974).

The dissent in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 158 & n.7 (1980), voiced substantial concerns over whether Arizona's assertion of these taxes violated equal protection or due process of law.

In its Ninth Circuit briefs Arizona did not challenge the *Maher v. Gagne* alternative ground for the fee award. The Ninth Circuit majority not only reversed the *Maher* alternate ground, which was unchallenged by Arizona, but also criticized the Tribe's brief for inadequately discussing this issue not raised by the appellant. (A-14 through A-19.)

The Ninth Circuit majority labors to conclude that the dissenters' constitutional concerns in *Bracker* failed the *Hagans v. Lavine* test of substantiality. However, as Judge Fletcher noted in dissent:

[T]he majority questions whether the Tribe's fourteenth amendment claims have 'sufficient merit' to justify a section 1988 award. This suggests that the majority has applied too strict a standard in reviewing the Tribe's fourteenth amendment claims, and has not simply examined whether those claims are 'inescapably . . . frivolous' as *Hagans* requires. (A-34 n.10)

3. Reversal of the Declaratory Judgment and Permanent Injunction.

The Ninth Circuit also reversed the District Court's declaratory judgment and permanent injunction against assertion of the illegal taxes by the State of Arizona. Though the state vigorously sought to collect the taxes and litigated its claim for nine years, the Ninth Circuit held that no "controversy 'of sufficient immediacy and reality' supported the

issuance of a declaratory judgment against assessment of the taxes." (A-21.) Arizona had presented no such issue in its Opening Brief.

4. Judge Fletcher's Dissent.

Judge Fletcher dissented, concluding that the Tribe's claims under the federal Indian timber laws were grounded in rights, privileges, and immunities within the meaning of § 1983 and, alternatively, that unadjudicated constitutional claims, including those concerns voiced by the dissenting opinion in *Bracker*, warranted a § 1988 award of attorneys' fees.

Judge Fletcher concluded:

Section 1983 provides a cause of action for state official's violations of federal statutes whenever (1) the statutes create "enforceable rights," and (2) Congress did not, in the statutes themselves, foreclose private enforcement of those rights through a section 1983 action. . . . I conclude that both these requirements are satisfied in respect to sections 406, 407, and 466, and that the Tribe is therefore entitled to vindicate its rights under these provisions in a section 1983 action. I further conclude, based on the Supreme Court's opinion in *Bracker*, that the Tribe's section 1983 claim under these provisions is meritorious. (A-27.)

In addition to the lengthy legislative history and judicial treatment of the federal Indian timber laws which show they create rights in the Indians (A-27 through A-32), Judge Fletcher noted the contradiction with this Court's holding in *United States v. Mitchell*, 463 U.S. 206 (1983). *Mitchell* holds, relying largely on this Court's earlier discussion in *Bracker*, that these same federal Indian timber laws which the Ninth Circuit holds create no "rights" enforceable against the states, do create a "substantive right enforceable [by tribes] against the United States for money damages" under the Tucker Act if the federal government breaches its fiduciary duties arising out of the timber laws by mismanaging the forest resource. 463 U.S. at 216-18, 224, 226.

Judge Fletcher further dissented from the Ninth Circuit majority's refusal to uphold the § 1988 attorneys fee award based on the presence of non-frivolous unadjudicated constitutional claims.

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT OPINION DIRECTLY CONFLICTS WITH DECISIONS OF THE NEW MEXICO AND ARIZONA APPELLATE COURTS UPHOLDING FEE AWARDS TO TRIBES IN SIMILAR CIRCUMSTANCES

This case is one of a trilogy², all of which have been decided by this Court, in favor of an Indian tribe, upholding the tribe's right to immunity from state taxation, based on preemptive federal laws designed for the benefit of Indians and tribes, in which attorneys' fees pursuant to 42 U.S.C. § 1988 have been sought upon remand from this Court. In each case, attorneys' fees were awarded after remand. These cases all raise the question, of vital importance throughout Indian country, whether attorneys' fees under § 1988 may be awarded to Indians and to tribes for vindicating their rights under preemptive federal laws to be free from interfering state taxes and laws. All three cases have been or will be before this Court again on this important attorneys' fees question.

After the Ninth Circuit's decision against the Tribe in this case, both the Arizona Court of Appeals in *Central Machinery* and the New Mexico Court of Appeals in *Ramah Navajo* have declined to follow the Ninth Circuit's opinion and affirmed fee awards to tribes. *Ramah Navajo School Board, Inc. v. Bureau of Revenue*, 104 N.M. 302, 720 P.2d 1243 (Ct. App. 1986), *cert. denied*, Nov. 3, 1986, No. 86-367 (A-143 through A-165) ("*Ramah Navajo II*"), purports to distinguish (A-162) the Ninth Circuit's Amended Opinion in

² *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) (Indian timber regulation); *Central Machinery Company v. Arizona State Tax Commission*, 448 U.S. 160 (1980) (Indian trader regulation); *Ramah Navajo School Board, Inc. v. Bureau of Revenue*, 458 U.S. 832 (1982) (Navajo education support).

this case. The distinction was largely politeness, for as this Court had held on the merits, *Ramah Navajo* "is indistinguishable in all relevant respects from White Mountain." 458 U.S. at 839. In its Petition for Certiorari, p. 11, No. 86-367, New Mexico asserted that *Ramah Navajo II* "is in direct and irreconcilable conflict with the opinion in *White Mountain Apache Tribe v. Williams*." Even the Brief in Opposition, p. 19, conceded that the Ninth Circuit case "was incorrectly decided because it fails to recognize that the tribe in question had enforceable rights under the timber regulations at issue there." This Court correctly denied certiorari on November 3, 1986, because *Ramah Navajo II* was correctly decided.

The Arizona Court of Appeals expressly rejected the original Ninth Circuit majority opinion and adopted Judge Ely's position in dissent when upholding the tribe's fee award in *Central Machinery Company v. State of Arizona*, No. 1 CA-CIV 7779, July 27, 1985 ("*Central Machinery IP*") ("The dissent appears to us to have the better argument." A-139 n.3).³

The Ninth Circuit is not only divided within (four judges splitting evenly), it is also in clear conflict with the Arizona and New Mexico decisions. Guidance from this Court on this unresolved question of importance to all Indian tribes is clearly warranted.⁴

³ Though it is a published opinion, *Central Machinery II* is not yet readily available. It is printed at A-135 through A-141. The Arizona Supreme Court granted review of *Central Machinery II* on January 21, 1986, and has not yet decided the case.

⁴ Whatever disposition the Arizona Supreme Court may give *Central Machinery II*, counsel for both parties advise us that the case will be brought before this Court.

This case is a better vehicle for Supreme Court resolution than *Central Machinery II* will be. Justice O'Connor was the trial judge in *Central Machinery*, and her earlier judicial participation in the case may preclude her participation in *Central Machinery II* when it reaches this Court. The issues in these cases deserve the attention of the full Court, which can be given in this case.

II. THE NINTH CIRCUIT'S EXCLUSION OF CERTAIN *DE FACTO* RIGHTS FROM §§ 1983 AND 1988 REMEDIES BY LABELING THEM *DE JURE* NON-RIGHTS IS CONTRARY TO *MAINE v. THIBOUTOT*, *PENNHURST*, AND OTHER APPELLATE DECISIONS.

A. The Tribe Has, and Has Used, a Private Right of Action Under the Federal Indian Timber Laws.

The doctrinal character and the practical effect of the Ninth Circuit's decision make it the most important case yet decided concerning recovery of attorneys' fees for vindication of the distinctive rights of Indians under our law. However, the decision below cuts an even wider doctrinal swath through the field of § 1983 and § 1988 law generally. Its methodology for disfranchising *de facto* federal rights by calling them non-rights is at odds with *Maine v. Thiboutot*, 448 U.S. 1 (1980), which holds that the remedies of § 1983 apply to all federally protected rights and are not limited to some subset of laws such as civil rights laws. 448 U.S. at 4.

Middlesex County Sewerage Authority v. National Sea Clammers Association, 453 U.S. 1 (1981), makes clear that some federal rights may, by virtue of other comprehensive remedies provided by Congress, by implication be excluded from additional remedies under §§ 1983 and 1988. This principle is of no concern to this case.

Furthermore, not all verbiage in federal statutes enacts substantive law and therefore creates rights. For example, in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), the Court held that the Developmentally Disabled Assistance and Bill of Rights Act of 1975, 42 U.S.C. § 6010, "does not create substantive rights" but "spoke merely in precatory terms" expressing "a Congressional preference for certain kinds of treatment," rather than obligating states to provide certain kinds of treatment to developmentally disabled people. Since the so-called "Bill of Rights" provided in § 6010 "confers no substantive rights, we need not reach the question of whether there is a private cause of

action under that section or under 42 U.S.C. § 1983 to enforce those rights." 451 U.S. at 27 n.21.

The *Pennhurst* truism that § 1983 only provides a remedy for what are otherwise federal rights is merely another way of saying that § 1983 does not itself enact substantive law. Statutory words that do not otherwise make substantive law will not be juridically transsubstantiated by § 1983.

Thiboutot does generate a question that has troubled many courts: whether a claim or a claimant who cannot otherwise satisfy the *Cort v. Ash*, 422 U.S. 66 (1975), test for private rights of action to enforce a federal statute may still be entitled to a private right of action by some lesser standard under § 1983. But the inquiry, whether under *Cort v. Ash* or under some lesser standard for § 1983, has always been whether the court will afford relief to a given plaintiff on a given contention of law. If a private right of action is found on any basis and § 1983 remedies are not ousted by other exclusive remedies, when the plaintiff wins his case he gets his § 1983 remedies. *Pennhurst* speaks only to whether a plaintiff can get into court.

The Ninth Circuit decision below stands *Thiboutot* and *Pennhurst* on their heads. After the plaintiff Tribe has not only gotten into court (and *Pennhurst* ceased to matter) but also won its case and obtained relief, the Ninth Circuit resurrects *Pennhurst* to try to prove that the Tribe never had any rights to begin with. But this very inquiry affronts tangible reality. The common sense empiricism about "rights" seen in *Pennhurst* is replaced by the Ninth Circuit's platonism, in which the world we see is but a shadowy image of some other and mysterious reality. Some real rights in the pragmatic sense are not rights in a more profound § 1983 sense. To borrow a phrase from Justice Harlan, the Ninth Circuit's new methodology reduces § 1983 analysis "to a word game played by secret rules." *Flast v. Cohen*, 392 U.S. 83, 129 (1968) (dissenting opinion).

The Ninth Circuit's fundamental transformation of *Pennhurst* upsets this Court's established § 1983 analysis on the broadest of doctrinal levels.

The White Mountain Apache Tribe has, and has used, a private right of action under the Indian timber laws themselves to restrain state action in violation of the timber laws. *A fortiori*, it must have a right of action under § 1983. There being no exclusion of § 1983 remedies by other exclusive remedies, the Tribe is entitled to §§ 1983 and 1988 remedies.⁵

B. The Ninth Circuit's Acknowledgement That the Federal Indian Timber Laws Are Intended to Benefit the Tribe Is Sufficient to Entitle the Tribe to § 1988 Remedies.

If it makes sense to inquire whether a plaintiff otherwise entitled to a private cause of action on underlying federal statutes must also satisfy some alternate and presumably lesser § 1983 test for private right of action, the fact that the Tribe is "specially benefitted" by the federal Indian timber laws more than satisfies that test. Even the Ninth Circuit follows the rule that a § 1983 plaintiff need only satisfy the first of the four elements of *Cort v. Ash*, 422 U.S. 66 (1975)—that he is a member of the class which Congress meant to "specially benefit" by the legislation. *Boatowners and Tenants Association v. Port of Seattle*, 716 F.2d 669, 672-73 (9th Cir. 1983); *Keaukaha-Panaewa Community Association v. Hawaiian Homes Commission*, 739 F.2d 1467, 1471 (9th Cir. 1984). The Ninth Circuit decision in this case conflicts with those decisions by requiring more than "Cort first-factor."

Indeed, another panel of the Ninth Circuit has quietly returned to the "Cort first-factor" test for § 1983 rights, without mention of the counterdecision in this case. *Coos Bay Care Center v. State of Oregon, Department of Human*

⁵ This Court's disposition of *Wright v. City of Roanoke Redevelopment and Housing Authority*, No. 85-5915, may well dispel the confusion some courts have shown over *Thiboutot-Pennhurst-Sea Clammers* and may expose the error in the Ninth Circuit's decision below. If *Wright* yields such an opinion, an appropriate disposition would be to grant this petition for certiorari, vacate, and remand for reconsideration in light of this Court's decision in *Wright*.

-Resources, _____ F.2d _____, No. 85-4049 (Nov. 3, 1986, 9th Cir.) (also holding, "It is not a bar to a § 1983 action that a private right of action cannot be 'implied' from the federal statute itself").

C. In Any Event, the Federal Indian Timber Laws Create Rights in the Indians.

A plain reading of the legislative, administrative, and judicial authorities discussed in *Bracker*, as well as the dissenting opinions of Judges Fletcher and Ely, shows that the federal Indian timber laws were intended to give Indians "rights" in their timber.

Indeed, this Court's holding in *United States v. Mitchell*, 463 U.S. 206 (1983), that the federal Indian timber laws create a "substantive right enforceable against the United States for money damages" under the Tucker Act compels the lesser conclusion that those same laws give the Indians rights enforceable against the states. Justices Rehnquist, White, and Stevens also noted in their dissenting opinion in *Ramah Navajo School Board, Inc. v. Bureau of Revenue*, 458 U.S. 832, 852 n.3 (1982), "The activity taxed in White Mountain was the exploitation of natural resources located on the reservation and devoted to the beneficial use and enjoyment of reservation Indians." (Emphasis added.)

The Ninth Circuit majority's exclusion of § 1983 remedies for "preemption of state law under the Supremacy Clause" and its apparent holding "that the Supremacy Clause alone will not support a § 1983 action" (A-9) are neither correct⁶ nor applicable to this case. There can no more be a claim under "the Supremacy Clause alone" without other federal rights than there can be a cheshire cat's smile without a cat. The Tribe's victory in *Bracker* takes all its substance from the Indian timber laws, not from "the Supremacy Clause alone."

⁶ The Ninth Circuit acknowledges its disagreement (A-9) with *Kennecott Corp. v. Smith*, 637 F. 2d 181 (3d Cir. 1980) (recognizing § 1983 action against state corporation takeover laws preempted by the Williams Act). *Accord City Investing Co. v. Simcox*, 633 F. 2d 56 (7th Cir. 1980).

The Ninth Circuit majority's statement that "the Arizona tax does not directly violate any federal law or regulation" (A-10) does not survive a plain reading of *Bracker*. More fundamentally, it is in conflict with the premises of judicial review, under which this Court can strike down state law *only* if it violates federal law.

The lower court's holding "that § 1983 was not intended to encompass those constitutional provisions which allocate power between state and federal government" (A-7), even if correct, is surely irrelevant to this case. The Indian timber laws are not constitutional "power allocating provisions" between state and federal government but legislative enactments to benefit Indians by excluding interfering state law. Their purpose is not to implement a theory of federalism but to protect Indians in their timber resources.

Thus, even overlooking the Ninth Circuit's methodological errors by which it arrives at its dispositive question, the Ninth Circuit gives the wrong answer to the question it poses. The federal Indian timber laws plainly create rights in the Indians.

III. THE PRESENCE OF UNRESOLVED, NON-FRIVOLOUS CONSTITUTIONAL ISSUES INDEPENDENTLY SUPPORTS THE § 1988 AWARD OF ATTORNEYS' FEES.

Judge Fletcher's dissenting opinion (A-23 through A-25, A-32 through A-40) thoroughly discusses the nature and the substantiality of the equal protection and due process concerns created by Arizona's changes in its position during oral argument before the Supreme Court in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 148 n. 14, 154-8 nn. 3, 4, 5, and 6. As Judge Fletcher notes (A-34 n. 3), the Ninth Circuit majority effectively abandons the *Hagans v. Lavine* test for substantiality and demands instead sufficient "merit" in unresolved fee claims.

Furthermore, as Judge Fletcher's dissent also shows, even under the Ninth Circuit majority's new *de facto* test of "merit," the equal protection and due process concerns of the dissenters in *Bracker* plainly do have merit.

IV. THE NINTH CIRCUIT'S ENDORSEMENT OF VOLUNTARY CESSATION AFTER ISSUANCE OF THE MANDATE ON APPEAL AS A CONCLUSIVE DEFENSE TO DECLARATORY AND INJUNCTIVE RELIEF IS IN DIRECT CONFLICT WITH DECISIONS OF THIS COURT.

This Court has long held that profession of voluntary cessation of allegedly illegal conduct does not deprive the court of jurisdiction to enter an injunction or declaratory relief if it is possible for the defendant to resume such conduct.⁷

Arizona has revived the old ruse of voluntary cessation, but with only the thinnest veneer of substance. It attempted to avoid judgment, not by promising cessation at the outset or during litigation, but only after persisting in unlawful conduct through nine years of litigation until a decision against it by the Supreme Court of the United States.⁸ The Ninth Circuit's reversal of the District Court's permanent injunction and declaratory judgment on such grounds is contrary to the decisions of this Court.

⁷ *United States v. Trans-Missouri Freight Association*, 166 U.S. 290, 308-09 (1897); *Federal Trade Commission v. Goodyear Tire & Rubber Co.*, 304 U.S. 257, 260 (1938); *Walling v. Helmerich & Payne*, 323 U.S. 37, 42-43 (1944); *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953); *United States v. Concentrated Phosphate Export Association*, 393 U.S. 199, 203 (1968); *Gray v. Sanders*, 372 U.S. 368, 376 (1963).

⁸ Indeed, the belated profession of voluntary cessation was itself especially thin. Arizona offered an affidavit of an employee asserting that the state did not "have any intention of levying, collecting, or enforcing in any way" the illegal taxes. He was immediately deposed, and he retracted his affidavit. He acknowledged that he could not speak for other state officials or future administrations and that if the attorney general or the governor instructed him to precipitate a future court challenge to the *Bracker* decision (just as it had forced these plaintiffs to commence this litigation to allow the State of Arizona to ask this Court to overrule *Warren Trading Post Company v. Arizona State Tax Commission*, 380 U.S. 685 (1965)—see *Bracker*, 448 U.S. at 151 n. 16), then he would immediately commence assessment and collection procedures against Pinetop. (Thorneycroft deposition, pp. 7-13.)

CONCLUSION

The petition for certiorari should be granted. If *Wright v. City of Roanoke Redevelopment and Housing Authority*, No. 85-5915, provides sufficient guidance as to the meaning of rights under § 1983 when it is decided, the judgment should be vacated and remanded for reconsideration in light of *Wright*. Otherwise, the case should be heard on the merits here, the judgment of the Court of Appeals vacated, and the judgment of the District Court affirmed.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WHITE MOUNTAIN APACHE TRIBE, an
Indian tribe established pursuant to
Executive Order, et al.,

Plaintiffs-Appellees,

v.

JACK WILLIAMS, Governor of the State
of Arizona, et al.,

Defendants,

and

JOHN McLAUGHLIN, Chairman, Ari-
zona State Transportation Board, et
al.,

Defendants-Appellants.

No. 81-5348
DC No. CV 73-788
PTC WEC
[Second]
AMENDED
OPINION

Filed
August 20, 1986

Appeal from the United States District Court
for the District of Arizona

Honorable Walter E. Craig, U.S. District Judge, Presiding

Argued and Submitted April 6, 1982-Los Angeles, California

Decided February 7, 1984

Petition for Rehearing Granted April 25, 1984

Reargued and resubmitted July 18, 1984-Phoenix, Arizona

Before: FLETCHER,* and NORRIS, Circuit Judges, and
BURNS,** District Judge.

NORRIS, Circuit Judge:

* Following the death of Senior Circuit Judge Walter Ely, Judge Fletcher was selected to replace him on the panel.

** Honorable James M. Burns, United States District Judge for the District of Oregon, sitting by designation.

This appeal presents the question whether Pinetop Logging Company ("Pinetop") and the White Mountain Apache Tribe (the "Tribe") have stated a claim under 42 U.S.C. § 1983¹ for which attorney's fees are available under the Civil Rights Attorney's Fees Award Act, 42 U.S.C. § 1988 (1976).²

I

The facts of this case are set out more fully in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). In brief, the White Mountain Apache Tribe, which inhabits a reservation in Arizona, organized a tribal enterprise to harvest timber. In 1969 the enterprise entered into a contract with Pinetop Logging Company which provided that Pinetop would perform logging operations on the reservation. *Id.* at 139. In 1971, the Arizona Highway Department and the Arizona Highway Commission assessed a motor carrier license tax and a use fuel tax against Pinetop for activities it performed pursuant to the contract. *Id.* at 139-40. Pinetop paid the taxes under protest, and then brought suit in state court to recover them. *Id.* at 140.

In December 1973, after the Tribe had agreed to reimburse Pinetop for the assessed taxes, *Id.* at 140, Pinetop and the Tribe brought a suit in federal court, seeking a declaratory judgment and an injunction to prevent any fur-

¹ 42 U.S.C. § 1983 states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

² 42 U.S.C. § 1988, the Civil Rights Attorney's Fees Award Act of 1976, provides:

In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

ther imposition of state taxes against Pinetop.³ In their federal complaint, Pinetop and the Tribe contended that federal law preempted the state tax laws and that the tax violated their rights to due process and equal protection.

Shortly after commencement of the federal action, the State of Arizona filed a motion requesting the district court to abstain on the ground that "the Arizona tax statutes here in question may be susceptible to an authoritative construction by the state courts in the pending state court action that would avoid or modify the Federal constitutional questions raised." The district court granted the motion, relying on the Supreme Court's decision in *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941), and at the same time granted a consent temporary restraining order forbidding the state agencies to assess further taxes against Pinetop.

Although not required to do so, Pinetop and the Tribe then elected to submit their federal preemption claim to the Arizona courts along with the questions of state law. In May 1975, the Arizona Superior Court rejected all their claims, state and federal, and entered judgment for the state. The federal district court then dismissed the federal action sua sponte. In early 1976, however, upon the motion of Pinetop and the Tribe, the district court vacated the dismissal order and entered a consent preliminary injunction pending final outcome of the state proceedings. In 1978, the Arizona Court of Appeals affirmed the state trial court judgment, characterizing the Tribe's arguments as "pure sophistry." *White Mountain Apache Tribe v. Bracker*, 120 Ariz. 282, 290, 585 P.2d 891, 899 (Ct. App. 1978), *rev'd*, 448 U.S. 136 (1980).

After the Arizona Supreme Court declined review, the state returned to federal district court with a motion to quash the consent preliminary injunction and to dismiss the

³ The Anti-Injunction Act, 28 U.S.C. § 1341 (1982), denies federal courts jurisdiction to enjoin state taxes. Federal jurisdiction in this case, however, rests on 28 U.S.C. § 1362, as interpreted in *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 475 (1976), which creates an exception to the Anti-Injunction Act in actions by Indian tribes to enjoin state taxes.

federal action. The district court denied the state's motion. The United States Supreme Court then reversed the Arizona Court of Appeals, holding that the state taxes were preempted because the comprehensive federal regulatory scheme governing the harvest and sale of tribal timber had occupied the field and because the state taxes would interfere with federal goals and policies. 448 U.S. at 151. Armed with a favorable state court judgment on their federal claims, Pinetop and the Tribe then returned to the district court seeking a declaratory judgment, a permanent injunction and attorney's fees. The district court granted all the relief sought, including attorney's fees of \$206,012.07. The state appeals. We reverse.

II

We first address the question whether Pinetop and the Tribe have stated a claim under § 1983 for which attorney's fees are available under § 1988. Pinetop and the Tribe argue that a claim of preemption of the state's power to tax Pinetop's logging operations on the reservation constitutes a claim of deprivation of "rights, privileges, or immunities secured by the Constitution and laws" within the meaning of § 1983. The Supreme Court decided in *Bracker*, *supra*, that the federal laws regulating the harvest and sale of tribal timber did preempt the Arizona tax statutes, reasoning that

Where ... the Federal Government has undertaken comprehensive regulation of the harvesting and sale of tribal timber, where a number of policies underlying the federal regulatory scheme are threatened by the taxes respondents seek to impose, and where respondents are unable to justify the taxes except in terms of a generalized interest in raising revenue, we believe that the proposed exercise of state authority is impermissible.

Bracker, 448 U.S. 136, 151 (1980). Although the Court acknowledged that "traditional notions of Indian self-government ... provided an important 'backdrop'" for its analysis, 448 U.S. at 143, it explicitly "based [its decision] on the preemptive effect of the comprehensive federal regulatory scheme" governing the timber harvest. *Id.* at 151 n.15.

The question whether the Supremacy Clause (U.S. Const. art. VI cl. 2) may be used as a sword in bringing a § 1983 action is, of course, different from that decided by the Supreme Court in *Bracker*—whether the Supremacy Clause may be invoked as a shield against the imposition of state taxes on tribal logging operations heavily regulated by the federal government. It is the former question that we must address.

Pinetop and the Tribe argue that because the federal laws that regulate timber operations on tribal lands are intended to benefit the Tribe, the laws may serve as the basis for a § 1983 claim. That the Tribe benefits from the federal timber regulations, however, is not dispositive of the issue. In this case, Pinetop and the Tribe did not prevail in the Supreme Court on a theory that the state had *violated* any of the federal laws or regulations governing logging operations on tribal lands. Rather, the Supreme Court in *Bracker* reasoned that state taxes were preempted because the federal government had pervasively regulated tribal logging operations and because state taxation would interfere with the goals and purposes of the federal regulatory scheme.

Thus the question presented is whether the Tribe's preemption claim, based on federal occupation of a regulatory field and inconsistency of state action with federal goals and policies, will support a civil rights action under § 1983.

A

The Supreme Court has never directly addressed the question whether the Supremacy Clause creates "rights, privileges or immunities" within the ambit of § 1983. In *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600 (1979), however, the Supreme Court did hold that the Supremacy Clause is not a substantive constitutional provision that creates rights within the meaning of 28 U.S.C.

§ 1343(3). *Id.* at 612-15.⁴ The Court noted, "even though that Clause is not a source of any federal rights, it does 'secure' federal rights by according them priority whenever they come in conflict with state law. In that sense all federal rights, whether created by treaty, by statute, or by regulation are 'secured' by the Supremacy Clause." *Id.* at 613. Under *Chapman*, therefore, the Supremacy Clause, standing alone, 'secures' federal rights only in the sense that it establishes federal-state priorities; it does not create individual rights, nor does it 'secure' such rights within the meaning of § 1983.

The primary function of the Supremacy Clause is to define the relationship between state and federal law. It is essentially a power conferring provision, one that allocates authority between the national and state governments; thus, it is not a rights conferring provision that protects the individual against government intrusion. The distinction between the two categories of constitutional controls has been enunciated by Professor Choper:

When a litigant contends that the national government (usually the Congress, but occasionally the executive, either alone or in concert with the Senate) has engaged in activity beyond its delegated authority, or when it is alleged that an attempted state regulation intrudes into an area of exclusively national concern, the constitutional issue is wholly different from that posed by an assertion that certain government action abridges a personal liberty secured by the Constitution. The essence of a claim of the latter type—which falls into the individual rights category of constitutional issues . . .—is that no organ of government, national or state, may undertake the challenged activity. In contrast, when a person alleges that one of the federalism provisions of the constitution has been violated, he implicitly concedes that one of the two levels of government—national or state—has the power to engage in the ques-

⁴ Section 1343(3) is the statutory provision conferring jurisdiction on federal district courts to hear actions commenced "[t]o redress the deprivation, under color of state law . . . of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights." 28 U.S.C. § 1343(3).

tioned conduct. The core of the argument is simply that the particular government that has acted is the constitutionally improper one. To put it another way, a federalism attack on conduct of the national government contends that only the states may so act; a federalism challenge to a state practice asserts that only the central government possesses the exerted power; neither claim denies government power altogether.

J. Choper, *Judicial Review in the National Political Process*, 174-75 (1980) (quoted with approval in *United Nuclear Corp. v. Cannon*, 564 F. Supp. 581 (D. R.I. 1983) and *Consolidated Freightways v. Kassel*, 556 F. Supp. 740, 746 (S.D. Iowa 1983) *aff'd* 730 F.2d 1139 (8th Cir.), *cert. denied*, 105 S.Ct. 126 (1984)).

We believe that § 1983 was not intended to encompass those Constitutional provisions which allocate power between the state and federal government. See *Consolidated Freightways v. Kassel*, *supra*, 730 F.2d at 1146 & n.16. The following excerpt from a speech by Representative Shel-labarger, a leading proponent of the 1871 Act, confirms the limited intentions of the framers of the § 1983:

Most of the provisions of the Constitutions which restrain and directly relate to the States, such as those in tenth section of first article, that "no State shall make a treaty," "grant letters of marque", "coin money", "emit bills of credit," & c., relate to the divisions of the political powers of the State and General Governments. They do not relate directly to the rights of persons within the States and as between the States and such persons therein. These prohibitions upon the political powers of the States are of such a nature that they can be, and even have been, when the occasion arose, enforced by the courts of the United States declaring void all State acts of encroachment on Federal powers. Thus, and thus sufficiently, has the United States "enforced" these provisions of the Constitution. But there are some that are not of this class. These are where the court secures the rights or liabilities of persons within the States, as between such persons and the States.

Cong. Globe, 42d Cong. 1st Sess., App. 69 (1871). As the Eighth Circuit has observed, "the implication of Rep. Shel-labarger's statement is that § 1983 was enacted to provide a remedy for the latter category of constitutional violation he mentions, and not the former." *Consolidated Freightways v. Kassel*, *supra*, 730 F.2d at 1146 n. 16.

Following the lead of the Supreme Court in *Chapman* and the framers of § 1983, the District of Rhode Island has answered in the negative the question whether the Supremacy Clause will support an action based on § 1983. In *United Nuclear Corp. v. Cannon*, 564 F.Supp. 581 (D. R.I. 1983), a utility sought fees under § 1988 after successfully challenging on preemption grounds a state statute imposing a bonding requirement on a nuclear power generating facility. The court there held that a successful Supremacy Clause challenge to state legislation could not serve as the basis for a § 1983 action, and hence attorney's fees were not available under § 1988. *Id.* at 585-7. The Eleventh Circuit reached the same conclusion in a decision affirming the dismissal of a § 1983 action: "The sole cause of the unconstitutionality was the supremacy clause. Therefore Pirolo is not entitled to a § 1983 remedy for enforcement of the ordinances." *Pirolo v. City of Clearwater*, 711 F.2d 1006, 1011 (11th Cir.), *reh'g denied*, 720 F.2d 688 (11th Cir. 1983).

An analogous question is posed by the invocation of § 1983 in cases based on the dormant Commerce Clause, another constitutional provision that has as its primary function the allocation of power between national and state governments. The most extensive treatment of the issue was provided by the Eighth Circuit in *Consolidated Freightways v. Kassel*, *supra*, a case in which a trucking firm sought § 1988 attorney's fees based on its successful dormant Commerce Clause challenge to an Iowa statute banning 65-foot twin trailer trucks. The Eighth Circuit held that

Although the Commerce Clause differs from the Supremacy Clause in that the Commerce Clause is a specific grant of legislative power to Congress, the two clauses are analogous in the sense that both clauses limit the power of a state to interfere with areas of

national concern. Just as the Supremacy Clause does not secure rights within the meaning of § 1983, neither does the Commerce Clause.

Id. at 1144. The Eighth Circuit's reasoning implies that the Supremacy Clause alone will not support a § 1983 action.

A similar question was addressed in *Connor v. Rivers*, 25 F. Supp. 937 (N.D. Ga. 1938), *aff'd* 305 U.S. 576 (1939). There, the district court decided that a dormant Commerce Clause claim did not provide jurisdiction under § 1343(3)—the provision for federal jurisdiction over civil rights cases irrespective of the amount in controversy—based on an analysis of the history of § 1983.⁵ *Id.* at 938. Because *Connor* was decided at a time when the general federal question jurisdictional provision contained an amount in controversy provision, the suit could only be maintained in federal court if it was maintainable as a civil rights action under § 1343(3). The Supreme Court affirmed *Connor* in a one sentence per curiam opinion noting the lack of the requisite jurisdictional amount in controversy. *Connor* reinforces the conclusion we draw from *Chapman*: power conferring provisions of the Constitution do not create “rights, privileges, or immunities” within the meaning of § 1983. Although there are federal court decisions that have held or assumed that the dormant Commerce Clause does support an action under § 1983,⁶ we find them unpersuasive because they do not undertake a substantial analysis of the issue. See *Consolidated Freightways Corp. v. Kassel*, 556 F. Supp., at 744-45.

We thus come down on the side of the weight of authority that preemption of state law under the Supremacy Clause—at least if based on federal occupation of the field or conflict with federal goals—will not support an action under § 1983,

⁵ At the time *Connor* was decided, § 1983 was codified as 8 U.S.C. § 43 and § 1343(3) was codified as 28 U.S.C. § 41(14).

⁶ See *Kennecott Corp. v. Smith*, 637 F.2d 181 (3d Cir. 1980); *Confederated Salish and Kootenai Tribes v. Moe*, 392 F. Supp. 1297 (D. Mont. 1974), *aff'd on other grounds*, 425 U.S. 463 (1976); *Confederated Salish and Kootenai Tribes v. Montana*, 392 F. Supp. 1325 (D. Mont. 1974).

and will not, therefore, support a claim of attorney's fees under § 1988.⁷

B

Pinetop and the Tribe do not directly confront the question whether the actual ground on which the decision in *Bracker* was made—preemption based on federal “occupation of the field” and “conflict with federal goals”—will support a § 1983 action. Rather, their argument seems to assume that there is a direct conflict between Arizona's tax and the federal regulations governing timbering on tribal lands. Thus, the Tribe's argument emphasizes the statutory scheme regulating logging operations on tribal lands—an emphasis that would be appropriate were this a direct conflict case. Because the Arizona tax does not directly violate any federal law or regulation, the Tribe's argument does not confront the crucial issue.

In developing their argument, Pinetop and the Tribe rely on *Maine v. Thiboutot*, 448 U.S. 1 (1980), in which the Court held that plaintiffs could recover in an action grounded on state violations of the Social Security Act because “the § 1983 remedy broadly encompasses violations of federal statutory as well as constitutional law.” *Id.* at 4. Unlike the situation in *Thiboutot*, no federal statute or regulation was violated by the Arizona tax on Pinetop's logging operation. Moreover, although some courts broadly interpreted the *Thiboutot* language to mean that § 1983 encompassed all federal statutes, *see, e.g., Yapalater v. Bates*, 494 F.Supp. 1349, 1358 (S.D.N.Y. 1980), *aff'd*, 644 F.2d 131 (2d Cir. 1981), *cert. denied*, 455 U.S. 908 (1982), the Supreme Court has since recognized that not all federal statutes

⁷ We emphasize that we are not dealing with a case where state action is in actual conflict with the explicit provisions of federal law. Therefore, we need not reach the question whether a Supremacy Clause claim might give rise to a § 1983 action where preemption was based on such actual conflict. Here we deal only with preemption based on federal occupation of the field and conflict between state law and federal goals and policies. For a discussion of the various branches of preemption doctrine, *see generally* L. Tribe, *American Constitutional Law* 376-89 (1978).

secure rights within the meaning of § 1983. See *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, 19 (1981); *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981).

Recognizing the Supreme Court's limitation of *Thiboutot* imposed by *Sea Clammers* and *Pennhurst*, Pinetop and the Tribe contend that our decision in *Boatowners and Tenants Association v. Port of Seattle*, 716 F.2d 669 (9th cir. 1983) supports their position. In *Boatowners*, an association of pleasure craft owners charged that the manner of operation of a municipal marina violated the River and Harbor Improvements Act, 33 U.S.C. §§ 540-633 (1982), and thereby constituted a deprivation of federal statutory rights cognizable under § 1983. We found that although pleasure craft owners certainly benefitted from the general navigational improvements fostered by this federal scheme, "there is no indication that the statute was intended to benefit specially the pleasure craft owners . . . nor that Congress intended to confer federal rights on [them]." *Id.* at 673 (footnote omitted). Accordingly, we held that the pleasure craft owners as a class had no "enforceable rights" as required by *Pennhurst* and *Middlesex County* for maintaining a § 1983 action. Pinetop and the Tribe argue that they are "specially benefitted" by the federal laws and regulations governing timber operations on tribal lands. Thus, they contend that Supremacy Clause preemption by those laws and regulations creates

a "right, privilege or immunity" within the meaning of § 1983.⁸

The relevant focus for inquiry, however, is not primarily whether the regulatory scheme was designed to benefit the Indians. Indeed it may have been so designed. Rather the focus must be on the basis of the Supreme Court's decision in *Bracker*—preemption pursuant to the Supremacy Clause. So directed, our inquiry leads to the conclusion that the *Bracker* decision is grounded not on individual *rights* but instead on consideration of *power*—the division of authority between the states and the national government. As the Court noted, "At the most general level, the taxes would threaten the overriding *federal objective* of guaranteeing Indians that they will 'receive . . . the benefit of whatever profit [the forest] is capable of yielding . . .'" *Bracker, supra*, 448 U.S. at 149 (citation omitted) (emphasis added). The court continued: "In addition the taxes would *undermine the Secretary's ability* to make the wide range of determinations committed to his authority concerning the setting of fees and rates with respect to the harvesting and sale of tribal timber." *Id.* (emphasis added) Hence, the focus of concern in

⁸ The dissent argues that the violation of federal regulations governing the harvest of tribal timber would give rise to a § 1983 action because those statutes were designed to benefit the Tribe. Dissent at 5-11. While we disagree that these regulations intended to create rights enforceable under § 1983, it is perhaps more important that the Tribe has never contended—and no court has ever found—that these statutes were ever violated. In our view, therefore, the Tribe fails to clear the first hurdle presented by the *Thiboutot-Pennhurst-Sea Clammers* line of cases. Unlike the situation in *Thiboutot*, or in *Boatowners*, no federal statute or regulation was violated by the Arizona tax on plaintiffs' logging operations. Rather we have a case in which pervasive federal regulation precludes any state regulation. See *Bracker*, 448 U.S. at 148. Section 1983, as interpreted in *Thiboutot* and its progeny, enforces federal statutory rights only against direct violations of the federal statute in question. See *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, 19 (1981) (*Thiboutot* recognized § 1983 action on behalf of "a private party claiming that a federal statute has been violated under color of state law."); *Pennhurst*, 451 U.S. at 28 (remanding for a determination of whether the state officials violated the DDA).

Bracker is state interference with federal policy objectives and the free exercise of authority by federal officials—not individual or tribal rights.

Moreover, the Tribe's exemption from state taxation of its timber business does not implicate individual rights; rather the exemption derives from its status as a sovereign.⁹ See *Bracker*, 448 U.S. at 148. Nor did the federal legislation create in the Tribe any new interest in the timber; the timber was already "owned by the United States for the benefit of the Tribe ..." *Id.* at 138. The central thrust of the legislation is merely to vest in the Secretary of the Interior authority to regulate the business of harvesting and selling the timber. See 25 U.S.C. §§ 406-407 (1982). In exercising that authority, the Secretary, of course, is required to base his decisions "upon a consideration of the needs and best interests" of the tribal owner. *Id.* § 406(a). However, the critical inquiry—as the Supreme Court made particularly clear in *Sea Clammers*—is whether there is any basis for the judiciary to infer a congressional intent to create rights enforceable under § 1983. 453 U.S. at 19-20. We find no basis for inferring such an intent in this case. For the purpose of applying § 1983 doctrine as enunciated in *Thiboutot*

⁹ Indeed, the Tribe's right to invoke the power of federal courts to enjoin Arizona from taxing Pinetop's logging operations rest on consideration of sovereignty, not individual rights. Any plaintiff other than an Indian tribe would be barred by the Tax Injunction Act from bringing a § 1983 action to enjoin state taxation and hence from obtaining attorney's fees under § 1988. While we do not address the question whether the Tribe may bring a § 1983 action to enjoin state taxation, we do note the hoops that the dissent is forced to jump through to make this determination. See *Dissent*, at 18-20 & n.16. The dissent recognizes that a tribe cannot avoid the bar of the Tax Injunction Act in an action based on the rights of individual tribe members. *Id.* at 19 n.15. The dissent also acknowledges that it is doubtful whether a tribe "qua sovereign" would qualify as a "citizen of the United States or other person" entitled to sue under § 1983. *Id.* The dissent purports to overcome these hurdles by opining that here the Tribe may sue under § 1983 because it is acting in this case as a "incorporated business entity". *Id.* at 20. Conventional business entities—such as Pinetop—would, of course, be barred by the Tax Injunction Act from bringing this action in federal court.

and its progeny, we see nothing remarkable about the fact that Congress intended the federal regulation to protect the interests of the beneficial owner of the timber. Indeed, the kind of regulatory legislation involved in this case is analogous to that involved in *Boatowners* where we also found no "enforceable rights." 716 F.2d at 673-74. There it was the regulation of municipal marinas; here it is the regulation of tribal timber business.

In sum, the Arizona tax on Pinetop's logging operations did not violate any federal statute. Nor is the existence of a federal "goal" or "policy", standing alone, sufficient to create a right cognizable under § 1983. Rather, the tax ran afoul of the Supremacy Clause because it was deemed to interfere in a general way with the authority and policies of the federal government. To be sure, the Supremacy Clause shielded the Tribe's timber business from state taxation, giving the Tribe a federal defense to any action brought by the state to collect the taxes; it does not follow, however, that in enacting the regulatory legislation, Congress intended to confer on the Tribe the right to use § 1983 as a sword to enjoin the collection of state taxes. The Tribe's § 1983 claim, rooted as it is in the power conferring function of the Supremacy Clause, must fail.

We therefore hold that the preemption claim of Pinetop and the Tribe does not give rise to a claim cognizable under § 1983. Accordingly, we conclude that the preemption claim does not support an award of attorney's fees under § 1988.

III

A

Plaintiffs argue in the alternative that even if their preemption claim does not give rise to a fee award under § 1988, they are entitled to fees on the basis of pendent Fourteenth Amendment claims pleaded in their original federal complaint. Plaintiffs rely upon *Maher v. Gagne*, 448 U.S. 122 (1980), for the proposition that a plaintiff who prevails on a claim not cognizable under § 1983 may recover fees under § 1988 on the basis of an unadjudicated constitu-

tional claim that satisfies the "substantiality" test of *Hagans v. Lavine*, 415 U.S. 528 (1974).

We reject this claim principally because plaintiffs have failed to provide us with any meaningful basis for evaluating their Fourteenth Amendment claims. All we have to go on is trying to understand and analyze the claims are the bare allegations in the complaint filed at the outset of the federal court action. Plaintiffs tell us nothing more about the claims other than that the complaint "specifically alleges claims under the Equal Protection Clause, Due Process Clause, and Indian Commerce Clause." Appellees' Answering Brief, at 50-51. We find these allegations, standing alone, far too meager to enable us to determine whether the claims meet the substantiality test of *Hagans v. Lavine*.¹⁰

The merit of plaintiffs' constitutional claims is rendered suspect not only by plaintiffs' failure to present this court with anything beyond a reference to the bare bones allegations of the complaint, but also by plaintiffs' failure to litigate these claims in the state courts. After the district court entered its *Pullman* abstention order, plaintiffs tendered their

¹⁰ Plaintiffs pleaded their equal protection claim in the district court as follows:

The denial of equal protection results from the state's attempt to impose unapportioned taxes on the plaintiff's logging operations occurring partly over roads maintained by the State of Arizona, but not on other operations that occur in part over state roads and part over non-state roads. There is no attempt to impose similar unapportioned taxes on carriers that operate partly in the State of Arizona and partly within some other state, and A.R.S. § 40-641 expressly exempts "receipts from property transported under a star route contract of the federal government."

There is no legal basis for the taxation; the taxation is arbitrary and discriminatory, lacking any rational basis. First Amended Complaint, ¶ XXIII.

Plaintiffs' due process claim was pleaded in its entirety as follows:

The unapportioned application of these taxes to the plaintiffs' operations constitutes a taking in contravention of the Fourteenth Amendment of the United States Constitution as due process is denied. First Amended Complaint, ¶ XXIV.

preemption claim to the state courts, but not the due process and equal protection claims.¹¹ Moreover, we agree with *Amici Curiae* that it is difficult to take these Fourteenth Amendment claims seriously "when the plaintiffs themselves did not think enough of the claims to even assert them in their brief to the U.S. Supreme Court."¹² Brief of *Amici Curiae*, at 8.

Even upon their return to the district court to seek attorney's fees, plaintiffs failed to put any flesh on the bare bones allegations of their complaint. Their motion for fees states merely that their "complaint also alleges violations of the Equal Protection and Due Process Clauses and the Indian Commerce Clause." Plaintiffs' Motion for Award of Attor-

¹¹ Although we do not have before us the record in the state court action, we infer that plaintiffs did not tender the Fourteenth Amendment claims to the state courts because plaintiffs have not disputed the state's contention that the plaintiffs "never argued in the state courts nor in the Supreme Court any constitutional violation." Reply Brief of Appellant, at 16. The record is clear that the claims are not mentioned in the published opinion of the Arizona Court of Appeals, *White Mountain Apache Tribe v. Bracker*, 120 Ariz. 282, 585 P.2d 891 (Ct. App. 1978), *rev'd*, 448 U.S. 136 (1980), and were not raised in the United States Supreme Court. See note 12, *infra*.

¹² Plaintiffs' response to this argument by *Amici* is grossly misleading. Plaintiffs say that their failure to raise the Fourteenth Amendment claims before the Supreme Court "proves only that the Supreme Court is the master of its docket, [because the Court] granted certiorari *only* on the federal preemption issue, and the plaintiffs briefed nothing more." Appellees' Answering Brief at 51-52 (emphasis in original). The clear implication of this explanation is that plaintiffs raised the due process and equal protection claims in their Petition for Certiorari, but that the Court's order granting certiorari excluded those claims from consideration. Upon recalling and reviewing the Petition for Certiorari and the various briefs in *White Mountain Apache Tribe v. Bracker*, we learned what plaintiffs failed to tell us: They did not raise any Fourteenth Amendment claims in their Petition for Certiorari. Moreover, neither due process nor equal protection was mentioned in any of the various briefs filed in the case. Thus the true explanation for plaintiffs' failure to argue the Fourteenth Amendment claims to the Supreme Court is not that the Court is the master of its docket, but that plaintiffs never asked the Court to consider those claims.

neys' Fees Pursuant to 42 U.S.C. § 1988, at 11. The district court awarded fees on the basis of the preemption claim without mentioning the Fourteenth Amendment claims. See Findings of Fact and Conclusions on the Plaintiffs' Motion for an Award of Attorneys' Fees Pursuant to 42 U.S.C. § 1988.

This is not a case where a § 1983 plaintiff seeks attorney's fees on the strength of constitutional claims which were pressed but not adjudicated because of "the longstanding judicial policy of avoiding unnecessary decision of important constitutional issue." *Maier v. Gagne*, 448 U.S. at 133. Rather, this is a case where the constitutional claims were never pressed beyond the original federal complaint until they were dusted off for use in seeking a fee award under § 1988. For all practical purposes, plaintiffs abandoned their Fourteenth Amendment claims when, following the invocation of *Pullman* abstention by the district court, they failed to tender the claims to the state courts and the United States Supreme Court along with their preemption claim. In contrast, the pendent constitutional claims that provided the basis for a fee award in *Maier* were never abandoned and their substantiality was adjudicated by both the district court and the court of appeals. See *Gagne v. Maier*, 455 F. Supp. 1344, 1348 (D. Conn.), *aff'd*, 594 F.2d 336 (2nd Cir. 1978), *aff'd*, 448 U.S. 122 (1980).

Finally, and perhaps most troublesome, is plaintiffs' failure to take advantage of their opportunity in this court for further exposition of their constitutional claims. They provide us with no meaningful analysis; the sole authority relied upon is Justice Stevens' dissent in *White Mountain Apache Tribe v. Bracker*, 448 U.S. at 158, a reliance we find to be misplaced. In the first place, plaintiffs mischaracterize Justice Stevens' dissent. They claim that he and Chief Justice Burger and Justice Rehnquist, who joined in the dissent, "felt that these state taxes *did violate* the due process and equal protection clauses". Appellees' Answering Brief, at 51 (emphasis added). All that Justice Stevens said was that *Pinetop*, as a private corporation doing business with an Indian tribe, "*may well have a right to be free from taxation*

as a matter of due process or equal protection," *Bracker*, 448 U.S. at 157 (Stevens, J., dissenting) (emphasis added), if the taxes burden a federal regulatory scheme and "there [is] no governmental interest on the State's part in imposing such a burden." *Id.* at 157. Indeed it would have been remarkable had Justice Stevens expressed the definitive opinion attributed to him by plaintiffs since preemption, not due process or equal protection, was the issue before the Court and the issue on which Justice Stevens disagreed with the majority. Justice Stevens' comments were clearly made solely for the purpose of contrast in the context of emphasizing that whatever valid grounds Pinetop might have had for challenging the state taxes, preemption was not one of them.

The second reason plaintiffs' reliance on Justice Stevens' dissent is misplaced is that the record leaves no room for doubt that Justice Stevens was not addressing the Fourteenth Amendment claims alleged in plaintiffs' federal complaint. Not only were those claims not before the Court in *Bracker*, which involved a review of the state court judgment, but also the dissent does not track the allegations of the federal complaint. Hence, whatever plaintiffs' constitutional theories might be, Justice Stevens was not addressing them. Justice Stevens speculated about conceivable constitutional claims that *Pinetop* as a private corporation might have, whereas the allegations in the complaint focus on the *Tribe's* status as a sovereign to enjoy treatment under Arizona tax laws on a par with the United States and the other states. Perhaps more importantly, Justice Stevens was speculating on possible constitutional implications of taxing vehicles used by Pinetop *solely* on private property, whereas the gravamen of plaintiffs' complaint is the state's failure to give plaintiffs beneficial treatment in *apportioning* the fuel use tax and motor carrier tax based upon travel on public

and private roads within the state.¹³ Moreover, while plaintiffs are correct in stating that Arizona's use fuel tax is levied "for the purpose of partially compensating the state for the use of its highways," Ariz. Rev. Stat. Ann. § 28-1552 (1976), they fail to point out that the tax is expressly levied "in lieu of" direct fuel taxes. Ariz. Rev. Stat. Ann. § 28-1554 (1976). As such, the use fuel tax is analytically indistinguishable from a direct fuel tax. We doubt that plaintiffs would seriously contend that Arizona can be forced to apportion direct fuel taxes collected at the pump.

In conclusion, we hold on the basis of the record before us that the Fourteenth Amendment claims fail to meet the substantiality test of *Hagans v. Levine* and have been asserted in this action at this late date "solely for the purpose of obtaining fees in [an action] where 'civil rights' of any kind are at best an afterthought." *Maine v. Thiboutot*, 448 U.S. 1, 24 (1980) (Powell, J., dissenting).

¹³ The dissent overlooks this crucial distinction in concluding that the plaintiffs were treated differently from other similarly situated parties in the state because taxes were being imposed for vehicles used solely on private property. *Dissent*, at 15. In fact, the vehicles involved were operated on both public and private roads. See *Bracker*, 448 U.S. at 154 & n.3.

In pleading their Fourteenth Amendment claim, plaintiffs' allege that the Tribe and its partner Pinetop have a constitutional entitlement to be treated in the same manner as interstate truckers whose state fuel use taxes are apportioned to capture only that portion of fuel use actually attributable to travel on roads within the state. See note 10, *supra*. Thus, the Tribe contended that, for the purpose of the Arizona tax, tribal roads should be treated as though they were in a separate state. Arizona refused to do this, asserting that Pinetop's activities took place solely within Arizona and that Pinetop should be taxed in the same manner as are all other commercial entities that use vehicles on both public and private roads in Arizona. Thus, contrary to the dissent's assertions, plaintiffs were not "singled out" for disparate treatment and taxes "differently from other landowners in the State." *Dissent*, at 13 n.10. Rather, they were taxed in exactly the same fashion as all others who use both public and private roads within Arizona—without apportionment. The only exception was the United States government, which was expressly exempted from the taxes. Ariz. Rev. Stat. § 40-641 (1982).

B

Finally, plaintiffs' failure to present their Fourteenth Amendment claims to the state courts provides an alternate ground for rejecting them as a basis for awarding fees under § 1988. While we recognize that a federal plaintiff subject to *Pullman* abstention is not required to tender his federal claims to the state courts for adjudication, see *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 421 (1963), we know of no authority suggesting that a federal plaintiff may tender some federal claims while reserving others arising out of the same nucleus of operative facts.¹⁴ While *England* carves out an exception to principles of res judicata in permitting a federal plaintiff to tender his pendent state claims to the state courts and return to federal court on his reserved federal claims in the event he fails to get adequate relief in the state action, we see no basis in law or logic for stretching that exception to permit him to reserve some of his federal claims while tendering others to the state courts for adjudication. Because plaintiffs would plainly have been barred by res judicata from returning to federal court to litigate its due process and equal protection claims had they failed to obtain a favorable state court judgment, we hold that plaintiffs may not use those claims as a basis for returning to federal court to seek a fee award under § 1988. For all practical purposes, plaintiffs abandoned their

¹⁴ The state argues that the district court lacked jurisdiction over the issue of attorney's fees when plaintiffs presented their federal claims to the Arizona courts. The state relies on *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 421, where the Court determined that federal claims presented to the state court under a *Pullman* order may not be relitigated in federal court. *Id.* at 419. We believe, however, that *England* does not present a jurisdictional bar to these claims, but rather announces only a rule of res judicata. Thus, the district court was not deprived of subject matter jurisdiction to hear the fees claim. Because we hold that plaintiffs do not have a § 1983 claim to support an award of fees under § 1988, we need not decide whether the Tribe may return to federal court on their discrete claim for attorney's fees after submitting their preemption claims to the state courts. Nor need we decide whether the Tribe lacks standing to seek a fee award under § 1988 because it is not a "citizen" or "person" within the meaning of § 1983.

due process and equal protection claims when they failed to tender them to the state courts along with their preemption claim.

In sum, we hold that plaintiffs are not entitled to a fee award on the basis of the unadjudicated constitutional claims alleged in their federal complaint.

IV

The state also appeals from the district court order granting a declaratory judgment and a permanent injunction. Plaintiffs contend that the injunction and declaratory judgment were appropriate because the district court's findings reflected a sufficient threat that the state would impose the impermissible taxes even after the Supreme Court barred it from doing so in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980).

In the absence of a controversy "of sufficient immediacy and reality," *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941), a district court lacks jurisdiction to issue a declaratory judgment. *Sellers v. Regents of the University of California*, 432 F.2d 493, 499-500 (9th Cir. 1970), cert. denied, 401 U.S. 981 (1971). Here, there is no evidence that state officials intend to ignore the Supreme Court's decision in *Bracker*. The record in fact contains evidence to the contrary. After the Supreme Court's decision, the state filed an affidavit stating that it did not intend to impose any of the disputed taxes on Pinetop and the Tribe. We have no basis for presuming from this record that the Arizona officials will not honor a final state court judgment based upon a decision of the United States Supreme Court. We therefore hold that the district court erred in concluding that a controversy "of sufficient immediacy and reality" supported the issuance of a declaratory judgment against assessment of the taxes for the years covered by the Supreme Court's decision.

Plaintiffs further contend, however, that the district court properly entered a declaratory judgment on the merits covering the 1968-71 tax period, since assessments covering that period were never adjudicated by either the state courts or

the Supreme Court. The state court tax refund action that ultimately reached the Supreme Court dealt only with taxes paid under protest after November 1971, and Pinetop and the Tribe argue that "each year is the origin of a new [tax] liability and a separate cause of action," *Commissioner v. Sunnen*, 333 U.S. 591, 498 (1948). They nevertheless concede that any attempt by the state to impose taxes covering the 1968-71 period would be thwarted by the doctrine of collateral estoppel. Appellees' Answering Brief at 27. See *Montana v. United States*, 440 U.S. 147 (1979). We thus see no justification at this time for entering a declaratory judgment on the merits or granting injunctive relief covering the 1968-71 period.

REVERSED.

WHITE MOUNTAIN APACHE TRIBE v. WILLIAMS,
No. 81-5348

FLETCHER, Circuit Judge, Dissenting:

I respectfully dissent.

There are three separate and independent bases to support the district court's award of attorney's fees to the Tribe under 42 U.S.C. § 1988 (1982). The Tribe has raised civil rights claims under 42 U.S.C. § 1983 (1982) sufficient to support the section 1988 award based upon (1) Arizona's alleged violations of the federal laws regulating the harvest and sale of reservation timber, 25 U.S.C. §§ 406-407, 466 (1982); (2) its alleged due process violations; and (3) its alleged equal protection violations by the state.

The Tribe raised these claims in its district court complaint;¹ they "aris[e] out of a 'common nucleus of operative fact'" along with the preemption claim upon which the Tribe prevailed in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980); the Tribe has never abandoned them. H.R. Rep. No. 1558, 94th Cong., 2d Sess. 4 n.7 (1976) (quoting *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966)); see *Maher v. Gagne*, 448 U.S. 122, 132 n.15 (1980) (quoting the House Report); *Southeast Legal Defense*

¹ The majority maintains that "[t]he Tribe has never contended and no court has ever found that the[] statutes [regulating Indian reservation-timber] were ever violated." Majority Opinion at __ n.8. However, the Tribe explicitly alleges in its complaint that "[t]he taxes and regulations attempted to be imposed by the State of Arizona are *in direct contravention* of the stated objectives of [the] Federal regulations" that were promulgated by the Secretary in order to fulfill his trust responsibilities under the reservation-timber laws. First Amended Complaint, § XXVII (emphasis added). Moreover, the Supreme Court expressly stated in *Bracker* that "the [Arizona] taxes would *threaten the overriding federal objective*" and "would *undermine [th(e)] policy*" for which the reservation-timber laws were enacted. *Bracker*, 448 U.S. at 149 (emphasis added). Thus, the Tribe has alleged, and the Supreme Court has strongly suggested, that the imposition of the challenged Arizona taxes "violat[ed] . . . rights created by federal statutes," as would be required to establish a section 1983 claim based on sections 406, 407, and 466 of the reservation-timber laws. *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1, 19 (1981) (emphasis added).

Group v. Adams, 657 F.2d 1118, 1124-25 (9th Cir. 1981); see also *Smith v. Robinson*, 468 U.S. 992, 104 S. Ct. 3457, 3464 (1984). I find that the Tribe's claim based on the federal reservation-timber laws is meritorious, and I find that its due process and equal protection claims satisfy the "substantiality" test of *Hagans v. Lavine*, 415 U.S. 528 (1974).² Moreover, I conclude that the Tribe has the capacity to bring a section 1983 action in federal court to vindicate

² In determining whether the Tribe's section 1983 claims support an award of section 1988 attorney's fees, the standards for evaluating claims based on alleged violations of federal statutes and claims based on alleged constitutional violations appear to be different. The legislative history of section 1988 provides that:

[when] a plaintiff joins a claim under one of the statutes enumerated in [section 1988, for which attorney's fees are available,] with a claim that does not allow attorney fees, that plaintiff, if it prevails on the non-fee claim, is entitled to a determination on the other claim for the purpose of awarding counsel fees. In some instances, however, the claim with fees may involve a constitutional question which the courts are reluctant to resolve if the non-constitutional claim is dispositive. In such cases, if the claim for which fees may be awarded meets the "substantiality" test [enunciated in] *Hagans v. Lavine* [, 415 U.S. 528 (1974),] attorney's fees may be allowed even though the court declines to enter judgment for the plaintiff on that claim, so long as the plaintiff prevails on the non-fee claim arising out of a "common nucleus of operative fact."

H.R. Rep. No. 1588, 94th Cong., 2d Sess. 4 n.7 (1976) (citations omitted and emphasis added), quoted in *Maher v. Gagne*, 448 U.S. 122, 132 n.15 (1980).

This language appears to suggest that for the Tribe to recover section 1988 attorney's fees based on its claims relating to the reservation-timber statutes, those claims must be determined to be meritorious, whereas to recover based on its constitutional due process and equal protection claims, those claims merely must be found to be "substantial," or non-frivolous. See *Hagans*, 415 U.S. at 537-38 (defining "substantiality" of claims); see also Section C, *infra*. Because I conclude that the Tribe's claim based on the reservation-timber statutes is meritorious, I need not decide whether a different standard applies in awarding fees for the Tribe's two different types of section 1983 claims. I find that any of the Tribe's three section 1983 claims independently supports the district court's award of attorney's fees.

these claims.³ Therefore, based upon the legislative history of section 1988 and the Supreme Court's decision in *Maheer v. Gagne*, 448 U.S. 122 (1980), I conclude that each of the Tribe's section 1983 claims is sufficient to justify the district court's award of attorney's fees. See H.R. Rep. No. 1558, *supra*, at 4 n.7; *Maheer*, 448 U.S. at 132 n.15 (quoting House Report); *Jensen v. Stangel*, No. 83-2473, slip op. at 4 (9th Cir. May 21, 1986) (concluding that Congress intended "a liberal construction of section 1988 to achieve the purpose of encouraging compliance with and enforcement of the civil rights laws").

A. The Tribe's Failure to Litigate Its Section 1983 Claims in Bracker

The majority contends that because the Tribe failed to litigate its section 1983 claims before the Arizona state courts and the United States Supreme Court in the *Bracker* case after the district court entered its *Pullman* abstention order, the Tribe effectively "abandoned" those claims for purposes of this case. Such a conclusion is contrary to the Supreme Court's decision in *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1963), and to our court's decision in *Tovar v. Billmeyer*, 609 F.2d 1291 (9th Cir. 1979).

In *England*, the Supreme Court provided that in cases where a federal district court enters an abstention order, "[i]f a party freely and without reservation submits his federal claims for decision by the state courts, litigates them there, and has them decided there, then . . . he has elected to forgo his right to return to the District Court." *England*, 375 U.S.

³ Because I reject the majority's conclusions that the Tribe's section 1983 claims are procedurally barred and are either non-meritorious or frivolous, I am required to address two issues that the majority is not required to resolve. First, I must determine whether, under the circumstances involved in this case, the Tribe qualifies as a "citizen" or "person" entitled to bring an action under Section 1983. I conclude that it does. See Section D, *infra*. Second, I must determine whether the Tribe's present section 1983 action can be brought in federal court under the "Indian tribes" exception to the Tax Anti-Injunction Act, 28 U.S.C. § 1341 (1982). I conclude that it can. See *id*.

at 419 (emphasis added). In the case before us, after the district court entered its abstention order, the Tribe did not submit its section 1983 claims for decision to the Arizona state courts or the United States Supreme Court, did not litigate them in those courts, and did not have them decided there. See *White Mountain Apache Tribe v. Bracker*, 120 Ariz. 282, 585 P.2d 891, 893-900 (Ariz. Ct. App. 1978), *rev'd*, 448 U.S. 126 (1980); *Bracker*, 448 U.S. at 138. The Tribe preserved its section 1983 claims, and cannot be found to have abandoned them.

Our court stated in *Tovar* that "[a] free and unreserved submission to the state court of all federal claims for complete and final resolution is necessary to bar return to the federal court." *Tovar*, 609 F.2d at 1294 (emphasis added). The majority itself concedes that the Tribe never freely submitted its section 1983 claims for resolution in the *Bracker* case.⁴ Thus, these claims were properly before the district court when it awarded section 1988 attorney's fees.

⁴ The majority asserts that although *England* creates an exception to traditional res judicata principles, it is essentially an all-or-nothing proposition: parties, like the Tribe, may not raise some, but not all, of their federal claims in state court while reserving their remaining federal claims. No such requirement has ever been imposed under the *England* doctrine. We stated in *Tovar* that "[a] free and unreserved submission of all federal claims . . . is necessary to bar return to the federal court." 609 F.2d at 1294 (emphasis added). The word "all" would be superfluous if the majority's interpretation of *England* were correct.

The majority also criticizes the Tribe for maintaining that its failure to raise its fourteenth amendment claims before the Supreme Court was due to the limited nature of the Court's order granting certiorari in *Bracker*. Majority opinion at _____. This issue is irrelevant to the disposition of the present case. The Tribe did not litigate its fourteenth amendment claims in the Arizona state courts, and therefore could not have raised them in the *Bracker* appeal. Yet, as noted above, based upon the decisions in *England* and *Tovar*, this tactical decision by the Tribe does not preclude it from relying on those claims as a basis for section 1988 attorney's fees in the present action.

B. The Tribe's Section 1983 Claim Based Upon the Indian Reservation Timber Laws

The majority maintains that even if the Tribe's claims were properly before the district court, violations of the federal laws regulating the harvest and sale of reservation timber, such as those alleged by the Tribe in this case, cannot give rise to a civil rights action under section 1983. I disagree. Section 1983 provides a cause of action for state officials' violations of federal statutes whenever (1) the statutes create "enforceable rights," and (2) Congress did not, in the statutes themselves, foreclose private enforcement of those rights through a section 1983 action. *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1, 18 (1981); *accord Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 28 (1981); *Almond Hill School v. United States Department of Agriculture*, 768 F.2d 1030, 1035 (9th Cir. 1985); *Keaukaha-Panaewa Community Association v. Hawaii Homes Commission*, 739 F.2d 1467, 1470 (9th Cir. 1984). I conclude that both these requirements are satisfied in respect to sections 406, 407, and 466, and that the Tribe is therefore entitled to vindicate its rights under these provisions in a section 1983 action. I further conclude, based upon the Supreme Court's opinion in *Bracker*, that the Tribe's section 1983 claim under these provisions is meritorious.

As the majority acknowledges, sections 406, 407, and 466 require the Secretary of the Interior to manage tribal timber resources based "upon a consideration of the needs and best interests" of the tribe, and to ensure that proceeds from any timber sales be paid to the tribe "or disposed of for [its] benefit," subject only to limited deductions for "administrative expenses" incurred by the federal government. 25 U.S.C. §§ 406(a), 413; 25 C.F.R. § 163.18 (1985); *see United States v. Mitchell*, 463 U.S. 206, 222 n.23, 224 (1983); *Bracker*, 448 U.S. at 145-47 & nn.12-13, 149 (citation omitted); *Short v. United States*, 719 F.2d 1133, 1135-36 (Fed. Cir. 1983), *cert. denied*, 104 S. Ct. 3545 (1984). The purpose of these provisions is to ensure that tribes receive "the benefit of whatever profit [the forest] is capable of yielding," *Bracker*,

448 U.S. at 147, 149 (citation omitted); *accord Mitchell*, 463 U.S. at 221-22, and to provide that tribal timberlands be managed "so as to obtain the greatest revenue for . . . Indians consistent with a proper protection and improvement of the forests." *Mitchell*, 463 U.S. at 224 (quoting U.S. Office of Indian Affairs, Regulations and Instructions for Officers in Charge of Forests on Indian Reservations 4 (1911)). The Supreme Court recently held, based largely upon its decision in *Bracker*, that these provisions establish a trust relationship between the federal government and tribes with timberlands on their reservations, and that they establish a "substantive right enforceable [by tribes] against the United States for money damages" under the Tucker Act if the federal government breaches its fiduciary duties.⁵ *Mitchell*, 463 U.S. at 216-18, 224, 226; *accord Short*, 719 F.2d at 1134-35 (interpreting *Mitchell* to cover both allotted and unallotted lands).

Our court recently held that a federal act establishing a land trust for the betterment of native Hawaiians created rights enforceable by those individuals under section 1983

⁵ The Court's conclusion in *Mitchell* that sections 406, 407, and 466 create a trust relationship between tribes and the federal government was foreshadowed in *Bracker*, where the Court not only suggested that such a trust relationship existed, but also concluded that Arizona's challenged taxes interfered with the Tribe's rights under that trust relationship:

[T]he [challenged] taxes would threaten the overriding federal objective of guaranteeing Indians that they will "receive the . . . benefit of whatever profit [the forest] is capable of yielding . . ." 25 C.F.R. § 141.3(a) (3) (1979). Underlying the federal regulatory program rests a policy of assuring that the profits derived from timber sales will inure to the benefit of the Tribe, subject only to administrative expenses incurred by the federal government. That objective is part of the general federal policy of encouraging Tribes "to revitalize their self-government" and to assume control over their "business and economic affairs." *Mescalero Apache Tribe v. Jones*, 411 U.S. at 151. The imposition of the taxes at issue would undermine that policy in a context in which the federal government has expressed a firm desire that the Tribe should retain the benefits derived from the harvesting and sale of reservation timber.

Bracker, 448 U.S. at 149.

against parties who interfere with or deprive them of their rights or benefits under the trust.⁶ *Keaukaha-Panaewa*, 739 F.2d at 1471-72. Similarly, the Eighth Circuit has held that interference by state or local officials with the rights of Indians who place their lands in trust with the federal government under 25 U.S.C. § 465 (1982)⁷ provides a basis for those Indians to bring section 1983 claims. See *Chase v. McMasters*, 573 F.2d 1011, 1017 (8th Cir.), *cert. denied*, 439 U.S. 965 (1978). Based upon these decisions and the Supreme Court's analysis in *Mitchell*, I conclude that by establishing a trust relationship between Indian tribes and the federal government, sections 406, 407, and 466 create rights that tribes who are deprived of their trust benefits or

⁶ The act at issue in *Keaukaha-Panaewa*, the Hawaiian Admission Act, Public Law No. 86-3, 73 Stat. 4 (1959), required that lands originally held by the United States in trust for native Hawaiians be maintained "as a public trust . . . for the betterment of the conditions of native Hawaiians . . . and their use for any other object shall constitute a breach of trust." Hawaiian Admission Act, § 5(f); see *Keaukaha-Panaewa*, 739 F.2d at 1469. Thus, the general terms and purposes of the Hawaiian trust are fairly similar to the terms and purposes of the trust for Indian timberlands identified by the Supreme Court in *Mitchell* and *Bracker*. See *Mitchell*, 463 U.S. at 219-25; *Bracker*, 448 U.S. at 149 (federal management of tribal timberlands is designed to "encourag[e] tribes 'to revitalize their self-government' and to assume control over their 'business and economic affairs'" (citation omitted)).

⁷ Section 465 authorizes Indians or Indian tribes to convey their lands in trust to the Secretary of the Interior in order to avoid state and local property taxes. See 25 U.S.C. § 465; *Chase v. McMasters*, 573 F.2d 1011, 1014-16 (8th Cir.), *cert. denied*, 439 U.S. 965 (1978).

whose trust relationships are disrupted can enforce under 1983.⁸

I also conclude that Congress did not intend to foreclose private enforcement under section 1983 of the rights it created for Indian tribes in sections 406, 407, and 466. We have held that "there is a presumption that a federal statute creating enforceable rights *may* be enforced in a section 1983 action," and that the burden is on the "governmental defendant [to] show that Congress intended the federal statute in question to provide the exclusive remedy." *Keaukaha-Panaewa*, 739 F.2d at 1470-71 (emphasis added and citations omitted); *accord Almond Hill School*, 768 F.2d at 1035. The text of sections 406, 407 and 466 does not suggest that Congress intended to preclude a section 1983 remedy. The three provisions do not include a "comprehensive enforcement scheme" with a "'balance, completeness and structural integrity' that would suggest remedial exclusivity," *Middlesex*, 453 U.S. at 20; *Almond Hill School*, 768 F.2d at 1035-36 (citations omitted); *Keaukaha-Panaewa*, 739 F.2d at 1471; *Department of Education, State of Hawaii v. Katherine D.*, 727 F.2d 809, 820 (9th Cir. 1983), *cert. denied*, 105

⁸ The majority's conclusion that the "regulatory legislation involved in this case is analogous to that involved in *Boatowners [and Tenants Association, Inc. v. Port of Seattle]*, 716 F.2d 669 (1983),] where [this court] also found no 'enforceable rights,'" majority opinion at _____, is plainly unsupported by a comparison of *Boatowners* and *Mitchell*. In *Boatowners*, we found that the

language and legislative history [of the statute at issue, the River and Harbor Improvements Act, 33 U.S.C. §§ 540-633 (1982),] indicate an intent to improve navigation, enhance commerce, and reduce vehicle-vessel traffic problems, all to the benefit of the general public. There is no evidence whatsoever of an intent to provide economical moorage or to create any special benefit for the class of pleasure craft owners. BOATA thus has no enforceable rights under the Act.

Boatowners, 716 F.2d at 673-74 (emphasis added). In contrast, the Supreme Court concluded in *Mitchell* that sections 406, 407, and 466 were designed specifically to benefit Indians and Indian tribes and created a trust relationship in which these groups were the beneficiaries. *Mitchell*, 463 U.S. at 222-25.

S. Ct. 2360 (1985), nor do they provide remedies that are inconsistent with those available under section 1983. See *Almond Hill School*, 768 F.2d at 1035-36; *Keaukaha-Panaewa*, 739 F.2d at 1471; *Katherine D.*, 727 F.2d at 820.

On the contrary, these provisions do not explicitly mention any remedies at all—the damages remedy against the federal government for breach of fiduciary duty that the Supreme Court recognized in *Mitchell* was based upon *inferences* the Court drew from the provisions' structure and legislative history. See 25 U.S.C. §§ 406, 407, 466; *Mitchell*, 463 U.S. at 218, 224-27. Even assuming that Congress specifically contemplated a Tucker Act remedy when it adopted the three provisions, we have held that a federal act providing only a single, limited remedy "does not contain a sufficiently comprehensive enforcement scheme to foreclose a section 1983 remedy." *Keaukaha-Panaewa*, 739 F.2d at 1471; see also *Almond Hill School*, 768 F.2d at 1036-37; cf. *Maine v. Thiboutot*, 448 U.S. 1, 66 (1980) (authorizing section 1983 action to enforce Social Security Act where only a single, limited remedy was expressly provided under the Act). Moreover, as the present case illustrates, limiting Indian tribes whose reservations contain timberlands to the sole remedy recognized in *Mitchell* would deny them any redress whatsoever against state officials who interfere with the trust relationship created by sections 406, 407, and 466 and who attempt to deny tribes the benefits to which these provisions entitle them. I therefore conclude, based upon the lack of any explicitly delineated remedies in sections 406, 407, and 466 and based upon the legislative history and background of the three provisions, that Congress did not intend to foreclose private enforcement of these provisions under sections 1983.

Since both conditions required by the Supreme Court for establishing the availability of a section 1983 cause of action are satisfied, I conclude that the Tribe was entitled to enforce its section 406, 407, and 466 rights against the defendants in a section 1983 action. See *Middlesex*, 453 U.S. at 19. Moreover, in light of the Supreme Court's decision in *Bracker*, I conclude that the Tribe's section 1983 claims

based upon these three provisions are meritorious. The Court stated in *Bracker* that "the [challenged Arizona] taxes would threaten the overriding federal objective of guaranteeing Indians that they will 'receive . . . the benefit of whatever profit [the forest] is capable of yielding.'" *Bracker*, 448 U.S. at 149 (citations omitted). It stated that "[t]he imposition of the taxes at issue would undermine" the "policy of assuring that the profits derived from timber sales will inure to the benefit of the Tribe, subject only to administrative expenses incurred by the Federal Government." *Id.* (citations omitted). Thus, the Supreme Court found that the challenged Arizona taxes deprive the Tribe of the central benefit guaranteed to it in its trust relationship with the federal government under sections 406, 407, and 466. See *Mitchell*, 463 U.S. at 221-24. I therefore conclude that the tribe would prevail on its section 1983 claim based on those three provisions.

C. The Tribe's Section 1983 Claims Based on Due Process and Equal Protection

The majority asserts that the Tribe's due process and equal protection claims are frivolous, "difficult to take . . . seriously," and so "insubstantial" that they will not support an attorney's fees award under section 1988. It concludes that even if these claims were properly before the district court, they do not satisfy the "substantiality test" of *Hagens*

v. Lavine, 415 U.S. 528 (1974).⁹ I disagree. The Supreme Court provided in *Hagans* that

claims are constitutionally insubstantial only if . . . prior decisions inescapably render the claims frivolous; previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial . . . A claim is insubstantial only if "its unsoundness so clearly results from . . . previous decisions . . . as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy."

⁹ The majority states that the Tribe's allegations concerning its fourteenth amendment claims in its complaint are "far too meager" for this court to determine whether or not they satisfy the *Hagans* "substantiality" test and support the district court's award of attorney's fees. Majority opinion at _____. I do not agree. While the Tribe's presentation of these claims in its complaint and subsequent pleadings has not been especially detailed, a reading of the Tribe's pleadings, along with the Supreme Court's opinions in *Bracker* and recent due process and equal protection cases, makes it clear that the Tribe's fourteenth amendment claims satisfy the *Hagans* test.

However, given that the majority believes that it has no "meaningful basis for determining whether [the Tribe's] fourteenth amendment claims . . . support a fee award under § 1988," majority opinion at _____. I find it inexplicable that the majority does not remand this case for further development on this issue. Instead, the majority has simply discarded a considered fee-award judgment by the district court and vacated a \$206,000 award to the Tribe.

The majority states that the district court awarded attorney's fees based exclusively on the Tribe's preemption claim and "did not [even] mention the [Tribe's] constitutional claims in making its fee award," majority opinion at _____, but this is simply not true. The district court's findings and conclusions on the Tribe's section 1988 request plainly state that the court awarded attorney's fees based on all the Tribe's section 1983 claims. The court did not single out any one claim for special mention. Even if the district court's award had been based on the Tribe's preemption claim, we are required to affirm the award as long as the Tribe's section 1983 claims based on the Indian timber laws are meritorious or its fourteenth amendment claims are not frivolous.

Hagans, 415 U.S. at 537-38 (quoting *Goosby v. Osser*, 409 U.S. 512, 518 (1973)) (citations omitted and emphasis added).¹⁰ I conclude that the Tribe's due process and equal protection claims are not insubstantial or frivolous under *Hagans*' definition, and therefore support the district court's award of attorney's fees under section 1988. See *Maher*, 448 U.S. at 132 n.15.

The dissenting opinion in *Bracker*, 448 U.S. at 153 (Stevens, J., dissenting), subscribed to by three Justices, concluded that the Tribe and "Pinetop may well have a right to be free from [the challenged Arizona] taxation as a matter

¹⁰ Although purporting to apply the *Hagans* test in evaluating the district court's fee award, the majority questions whether the Tribe's fourteenth amendment claims have "sufficient merit" to justify a section 1988 award. This suggests that the majority has applied too strict a standard in reviewing the Tribe's fourteenth amendment claims, and has not simply examined whether those claims are "inescapably . . . frivolous," as *Hagans* requires. *Hagans*, 415 U.S. at 537-38.

of due process or equal protection." *Id.* at 158 & n.7.¹¹ It seems unlikely that one-third of the Supreme Court would make such a statement if, as the majority suggests, previous " ' decisions ... leave no room for the inference that the questions [involved can] be the subject of controversy.' " *Hagans*, 415 U.S. at 538 (citations omitted).

The majority opinion in *Bracker* demonstrates that all the necessary elements are present for the Tribe, acting in its

¹¹ The majority contends that the statements in the *Bracker* dissent concerning possible due process and equal protection claims arising out of the challenged Arizona taxes do not support the Tribe's fourteenth amendment claims, because these statements refer to claims potentially available to "Pinetop as a private corporation rather than to claims potentially available to the Tribe." Majority opinion at _____. The majority maintains that the Tribe's fourteenth amendment claims, in contrast to Pinetop's, arise out of the Tribe's "status as a sovereign" and are based on the assumption that the Tribe is entitled to receive "beneficial [or preferential] treatment" above and beyond that of other individuals and entities. *Id.*

However, the majority has misinterpreted the Tribe's due process and equal protection claims and has confused them with the preemption claim it advanced in *Bracker*. Although the underlying premise of the Tribe's preemption claim in *Bracker* was that the State must accord *special* treatment to the Tribe's timberlands and cannot regulate them to the same extent as it regulates other timberlands, *see generally Bracker*, 448 U.S. at 445-53, the Tribe's fourteenth amendment claims in this action are based on the allegation that Arizona has impermissibly discriminated against the Tribe and singled it out by taxing it *differently* from other landowners in the state without any apparent rational justification.

The Tribe has raised its fourteenth amendment claims in its capacity as a corporation seeking to make commercial use of its reservation lands. *See* Section D, *infra*. Its due process and equal protection claims are identical to those that any corporate entity would raise if it were treated disparately under a state taxing scheme. These claims have nothing to do with the Tribe's status as a sovereign entity. They arise out of the Tribe's joint commercial venture with Pinetop, *see id.*, and are therefore identical to any fourteenth amendment claims that Pinetop would be entitled to raise as a corporation. Therefore, any statements in the *Bracker* dissent relating to possible due process and equal protection claims available to Pinetop would be equally applicable to the Tribe.

corporate capacity,¹² to raise viable due process and equal protection challenges to Arizona's vehicle taxes. First, the *Bracker* majority noted that "it is undisputed that the economic burden of the asserted taxes will ultimately fall on the Tribe." *Bracker*, 448 U.S. at 151. Thus, the Tribe has standing to challenge the Arizona taxes and has alleged that imposition of these taxes deprived it of property under the fourteenth amendment. See *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975); *Fuentes v. Shevin*, 407 U.S. 67, 86 (1972).

Second, Arizona conceded during oral argument in *Bracker* that its taxes do not apply to the use of vehicles on private roads and property in the state. *Bracker*, 448 U.S. at 154-55 & nn.3-4 (Stevens, J., dissenting) (quoting Supreme Court transcript); see also *id.* at 148 n.14. Yet the *Bracker* majority found that Arizona had taxed the use of vehicles by the Tribe and Pinetop in operations "conducted solely on the Fort Apache Reservation" and on roads that were "built, maintained, and policed exclusively by the Federal Government, the Tribe, and its contractors." *Id.* at 150. Thus, Arizona treated the Tribe differently from other, similarly situated parties in the state who operate vehicles on non-state maintained roads and private property.¹³

¹² See the discussion relating to the Tribe's corporate or propriety capacity in Section D, *infra*.

¹³ The majority asserts that the challenged Arizona taxes are typically assessed "without apportionment" between mileage driven on state-maintained roads and non-state-maintained roads for entities or land-owners based in Arizona. Majority opinion at _____ n.13. Thus, according to the majority, the Tribe is not entitled under Arizona law to have the taxes chargeable to its and Pinetop's timber operations apportioned, and its demand for tax apportionment in its complaint represents a request for *preferential treatment*, as opposed to *equal protection*. *Id.* The majority interprets the Tribe's equal protection claim as alleging that the Tribe and Pinetop are constitutionally entitled to be treated "in the same manner as interstate truckers" passing through Arizona, and that the "tribal roads [on its reservation] should be treated as though they [are] in a separate state." *Id.*

However, the majority has misinterpreted the challenged Arizona taxing scheme, and oversimplified the Tribe's equal protection claim. Con-

Finally, the *Bracker* majority reiterated throughout its opinion that the State of Arizona is "unable to identify any regulatory function or service performed by the State that would justify the assessment of taxes for activities on Bureau [of Indian Affairs] and tribal roads within the reservation." *Id.* at 148-49, 150-51. This suggests that there may well be

trary to the majority's assertion, Arizona's fuel taxes are assessed for in-state taxpayers based upon the types of roads on which they use their vehicles. Section 28-1552 provides that "an excise tax [shall be] imposed [at the rate of eight cents per gallon] on use fuel used in the propulsion of a motor vehicle on any highway within this state." Ariz. Rev. Stat. Ann. § 28-1552 (1985) (emphasis added); see *Bracker*, 448 U.S. at 139-40. Thus, according to the plain terms of this and other provisions, Arizona's use fuel tax is imposed only for gasoline used by taxpayers to travel on state-maintained highways—it is not assessed based upon their total mileage during the year. See Ariz. Rev. Stat. Ann. §§ 28-1551(4) (1985) (defining "highway" to mean only those roads "open to the use of the public"), § 28-1578 (authorizing refund of use fuel tax to "[a]ny person who purchases taxpaid use fuel and . . . uses it in this state for purposes other than to propel a motor vehicle upon the highways of this state") (emphasis added); see also Ariz. Stat. Ann. §§ 28-1555(B)(1) (taxpayers can obtain written authorization not to pay use fuel tax to vendors and instead to self-assess tax if they "operate a motor vehicle [either] within and without this state or on and off the highways of this state"), § 28-1556 (establishing rebuttable presumption that all fuel inserted into a vehicle's gas tank is "consumed in propelling the vehicle on the highways of this state") (emphasis added).

no rational basis for or legitimate purpose furthered by Arizona's disparate treatment of the Tribe and other parties. See *Williams v. Vermont*, 105 S. Ct. 2465, 2472 (1985); *Metropolitan Life Insurance Co. v. Ward*, 105 S. Ct. 1676, 1683 (1985). Thus, the *Bracker* majority concluded that imposition of the challenged Arizona taxes deprived the Tribe of

Moreover, Arizona's assistant attorney general made a series of statements and concessions during the Supreme Court argument in *Bracker* indicating that Arizona apportions mileage when assessing its challenged taxes. He stated initially that "'so long as road[s] remain[] private thoroughfare[s], the] use of those road[s] would not be subject to the State tax.'" *Bracker*, 448 U.S. at 154 n.3 (Stevens, J., dissenting) (quoting Assistant Attorney General Macpherson). Yet, if the majority's interpretation of the Arizona tax statutes is correct, taxpayers would not be permitted to apportion their taxes based upon their relative use of state highways and other roads, and their use of "private thoroughfare[s]" would be taxed so long as they also used state highways at some point during the year. Furthermore, Arizona conceded during the Supreme Court argument that it did not intend to "tax use on . . . tribal roads" regardless of the state courts' prior decisions on the matter, and the Tribe's attorney welcomed this concession. *Id.* at 154-56 & n.4 (Stevens, J., dissenting) (quoting attorneys Macpherson and Wake); see *id.* at 148 n.14. This concession would have been meaningless if, as the majority contends, Arizona's taxes were determined without apportionment, because the Tribe admitted that it and Pinetop used state highways and

property, that in imposing these taxes, Arizona treated the Tribe differently from other, similarly situated entities, and that Arizona has failed to identify any rational basis for doing so. I conclude, as a result, that the due process and equal protection claims raised by the Tribe are not frivolous or foreclosed by prior decisions, and therefore support the

B.I.A. roads in their operations. *Id.* at 154 n.2 (Stevens, J., dissenting). The three Justices dissenting in *Bracker* expressly noted that Arizona's concessions regarding tribal and private roads would reduce the taxes owed by Pinetop and the Tribe: thus, they expressly interpreted the Arizona statutes to authorize apportionment of mileage in determining the amount of taxes owed. *See id.* at 159 & n.8 (Stevens, J., dissenting). For all these reasons, it seems clear that Arizona assesses at least some of its challenged taxes based upon the road-use of the individual taxpayer.

The Tribe's equal protection claim in this action arises out of Arizona's refusal to apportion the Tribe's and Pinetop's mileage in assessing their fuel taxes, even though it apportions mileage for "other operations that occur in part over state roads and part over nonstate roads." First Amended Complaint, ¶ XXIII. Despite the majority's claims, these "other operations" include Arizona-based as well as non-Arizona-based individuals and entities. The subsequent reference in the Tribe's complaint to "carriers that operate [only] partly in the State of Arizona," upon which the majority relies, does not signify that the Tribe's equal protection claim is entirely premised upon the treatment received by "interstate truckers," as the majority contends—it merely states an alternative equal protection argument. *See id.*

district court's award of section 1988 attorney's fees.¹⁴ See, e.g., *Williams*, 105 S. Ct. at 1679-84.

D. The Tribe's Capacity to Bring A Section 1983 Action In Federal Court

Since the Tribe has asserted viable section 1983 claims based upon the Indian reservation timber laws and the due process and equal protection clauses, it is entitled to recover section 1988 attorney's fees if (1) it has the capacity to bring a section 1983 action based on those claims; and (2) such an action is not barred in the federal courts by the Tax Anti-

¹⁴ The majority asserts that because the challenged Arizona use fuel tax "is expressly levied 'in lieu of' direct fuel taxes," it is therefore "analytically indistinguishable from a direct fuel tax." The majority contends as a result that the Tribe cannot challenge Arizona's unequal imposition of the use fuel tax, because it could "not seriously contend that Arizona should be forced to apportion direct fuel taxes collected at the pump." Majority opinion at ____.

This argument is seriously flawed. The fact that a state can conceivably tax an individual or entity under one tax scheme does not automatically entitle it to impose taxes upon that individual or entity under a different tax scheme when other similarly situated individuals or entities are not being taxed under that scheme. Otherwise, there could never be due process or equal protection challenges to state taxing schemes, because it would always be possible to hypothesize situations in which the victims of alleged discriminatory treatment could be taxed.

Arizona chose to adopt its use fuel tax. It is responsible for administering that tax in an evenhanded, non-discriminatory fashion that will withstand due process and equal protection scrutiny. If Arizona chooses to change to a direct fuel tax so that it can tax the Tribe and other private landowners for fuel used on non-state-maintained roads and private property, it certainly would be entitled to do so. However, the fact that Arizona could conceivably change its tax system does not affect the resolution of this case.

Injunction Act, 28 U.S.C. § 1341 (1982).¹⁵ Although not every action by an Indian tribe challenging the imposition of state taxes will satisfy these two requirements, I conclude, based on the circumstances of this case and the capacity in which the Tribe initiated this litigation, that the present

¹⁵ The Tax Anti-Injunction Act provides that:

[Federal] district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

28 U.S.C. § 1341. Courts have recognized a limited exception to this provision for "Indian Tribes." See *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 462-75 (1976); see also Section D, *infra*. Since the Anti-Injunction Act applies only to actions brought in *federal court*, had the Tribe chosen to raise its section 1983 claims in its parallel state-court action, section 1341 would not have served as a bar to its section 1983 claims.

action satisfies both requirements, and that the Tribe is entitled to recover section 1988 attorney's fees.¹⁶

¹⁶ A tribe's ability to bring an action in federal court challenging the imposition of state taxes depends on the capacity in which the tribe initiates the litigation and the basis of the tribe's standing to bring such a challenge. The Supreme Court indicated in *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976), that in actions involving challenges to the imposition of state taxes, the source of parties' standing to bring the actions must coincide with the basis on which subject-matter jurisdiction is asserted. *See id.* at 468 n.7.

In the present action, the Tribe's standing is based upon its proprietary, corporate activities; as a result, in order to maintain its action, the Tribe must be entitled to bring a section 1983 action and must qualify for the "Indian tribes" exception to section 1341 while acting in its corporate capacity. The Tribe could also have challenged Arizona's taxes in its sovereign, governmental capacity, if the imposition of those taxes adversely affected its exercise of its powers of self-government, or if the taxes were imposed on the Tribe's governmental operations. *See id.*; *see also Assiniboine & Sioux Tribes v. Montana*, 568 F.Supp. 269, 276 (D.Mont.1983) (tribal vehicles had to be taxed for Tribe to have standing to seek refund under *Moe*). Such an action would clearly not be barred by section 1341. *See, e.g., Moe*, 425 U.S. at 474-75. However, it is doubtful whether the Tribe qua sovereign would qualify as a "citizen of the United States or other person" eligible to bring an action under section 1983 for deprivation of its rights, privileges, or immunities. *See City of Safety Harbor v. Birchfield*, 529 F.2d 1251, 1253-55 (5th Cir. 1976) (municipality is not a "person" entitled to bring section 1983 action); *Buda v. Saxbe*, 406 F.Supp. 399, 403 (E.D.Tenn. 1974) (a "state is not a '... citizen of the United States or other person within the jurisdiction thereof ...' within the contemplation of 42 U.S.C. § 1983."); *Spence v. Boston Edison Co.*, 390 Mass. 604, 459 N.E.2d 80, 83-84 (1983) (city housing authority cannot bring section 1983 action to enforce due process or equal protection rights); *see also City of South Lake Tahoe v. California Tahoe Regional Planning Agency*, 625 F.2d 231, 233 (9th Cir.) ("[p]olitical subdivisions of a state may not challenge the validity of a state statute under the Fourteenth Amendment."), *cert. denied*, 449 U.S. 1039 (1980).

Similarly, the Tribe could have brought an action challenging Arizona's vehicle taxes as a representative of or as a *parens patriae* for its individual members, in order to vindicate their individual rights. See, e.g., *Assiniboine & Sioux Tribes*, 568 F.Supp. at 277; see also *Little Earth of United Tribes, Inc. v. United States Department of Housing and Urban Development*, 584 F.Supp. 1292, 1295-97 (D.Minn. 1983). When acting solely in a representative capacity, a tribe's standing is based exclusively upon the standing of its individual members: the tribe simply raises claims that its members could raise individually, and essentially stands in the same position as they would, had they brought the action collectively. See *International Union, United Automobile Aerospace, and Agricultural Implement Workers of America v. Brock*, No. 84-1777, slip op. at _____ (S.Ct. June 25, 1986); *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333, 343 (1977); *United States v. Students Challenging Regulatory Agency Procedures (S.C.R.A.P.)*, 412 U.S. 669, 683-90 (1973); *Sierra Club v. Morton*, 405 U.S. 727, 735-39 (1972); see also *Assiniboine & Sioux Tribes*, 568 F.Supp. at 277. Thus, the Tribe would clearly be entitled to bring a section 1983 action based upon alleged violations of its members' due process and equal protection rights, or their rights under the Indian reservation timber laws. See, e.g., *Thompson v. New York*, 487 F.Supp. 212, 216 (N.D.N.Y. 1979) (individual Indians can maintain section 1983 actions based on alleged violations of their equal protection rights).

However, it would appear inconsistent with our prior decisions to allow tribes suing merely as representatives of their individual members to avoid the bar of section 1341. We have held that the "Indian tribes" exception to section 1341 does not apply to suits brought by individual Indians, see *Comenout v. Washington*, 722 F.2d 574, 577 (9th Cir. 1983); *Dillon v. Montana*, 634 F.2d 463, 469 (9th Cir. 1980), or by Indian entities that are less than full-scale "Indian tribes[s] or band[s]," as that phrase is used in 28 U.S.C. § 1362 (1982). See *Navajo Tribal Utility Authority v. Arizona Department of Revenue*, 608 F.2d 1228, 1231 (9th Cir. 1979). In light of these decisions, authorizing Indian tribes to bring representative actions in federal court challenging the collection of state taxes on behalf of their members would undermine and perhaps trivialize section 1341 by enabling individual Indians to avoid section 1341's bar simply by having their tribe bring a "representative" action on their behalf. See *Assiniboine & Sioux Tribes*, 568 F.Supp. at 277. Moreover, the Supreme Court noted in *Moe* that if standing to bring an action challenging the imposition of state taxes is based exclusively upon the rights of individual tribal members, those tribal members must be authorized to invoke the jurisdiction of the federal courts in their own right. See *Moe*, 425 U.S. at 468 n.7 (citing *Zahn v. International Paper Co.*, 414 U.S. 291, 294 (1973)).

The Tribe brought this action in its capacity as an incorporated business entity under section 17 of the Indian Reorganization Act (IRA), 25 U.S.C. § 477 (1982):¹⁷ its

¹⁷ Section 17 of the IRA authorizes Indians to request the Secretary of the Interior to issue charters of incorporation to their tribes once the tribes have adopted constitutions and bylaws and organized tribal governments under section 16 of the IRA, 25 U.S.C. § 476 (1982). Congress enacted section 17 specifically "to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism." *Mescalero Apache Tribe v. Jones*, 411 U.S., 145, 152 (1973) (quoting H.R.Rep., No. 1804, 73rd Cong., 2d Sess. 1 (1934)). It sought to promote the organization of tribal business enterprises and to enable those enterprises "to enter the white world on a footing of equal competition." 78 Cong. Rec. 11732 (1934); accord *Mescalero Apache Tribe*, 411 U.S. at 157 (quoting above passage from Congressional Record).

The Supreme Court and other courts have recognized a distinction between tribes acting as business entities pursuant to IRA section 17 and as sovereign, governmental entities pursuant to section 16, and have consistently indicated that the capacity in which a tribe is acting helps to determine its legal rights, privileges, and immunities. See *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 105 S.Ct. 1900, 1903 (1985) (distinguishing between tribe's "role as commercial partner" and its "role as sovereign"); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 145-47 (1982) (noting same distinction in determining that tribe was entitled to impose taxes in its sovereign capacity upon parties with whom it had lease agreements); *Ramey Construction Co. v. Apache Tribe*, 673 F.2d 315, 320 (10th Cir. 1982) (tribe's "constitutional and corporate entities [are] separate and distinct" and may differ in the extent to which they possess tribal sovereign immunity); *Parker Drilling Co. v. Metlakatla Indian Community*, 451 F.Supp. 1127, 1131-35 (D.Alaska 1978); *Atkinson v. Haldane*, 569 P.2d 151, 174-75 (Alaska 1977); *Request for Interpretative Opinion on the Separability of Tribal Organizations Organized Under Section 16 and 17 of the Indian Reorganization Act*, 65 I.D. 483, 484 (1958) (Solicitor's report analyzing IRA's legislative history and concluding that "the powers, privileges and responsibilities of [section 16 and 17] tribal organizations materially differ"). In analyzing the IRA's legislative history and the differences between tribes acting in their section 16 and section 17 capacities, the Solicitor concluded that:

The purpose of Congress in enacting section 16 of the Indian Reorganization Act was to facilitate and to stabilize the tribal organization of Indians residing on the same reservation, for their common welfare. It

standing to challenge Arizona's taxes is based on the tax burden it incurred while operating in a proprietary capacity. See *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 468 n.7 (1976) (focussing on basis of tribe's standing to challenge particular state taxes); see also *Assiniboine & Sioux Tribes*, 568 F.Supp. at 276-77. The Tribe's first amended complaint states that "[t]he forestry operations of the tribe are run by the Fort Apache Timber Company [FATCO], a wholly owned business of the White Mountain Apache Tribe . . . The lumbering operation is the Tribe's principal industrial activity and provides a substantial portion of the revenue and employment for the tribe and its members." FATCO has contractual agreements with six logging companies, including Pinetop, under which the companies fell trees, cut them to specified size, and transport them to FATCO's sawmill for a contractually-specified fee. When Arizona assessed taxes on Pinetop for its use of roads within the White Mountain Apache Reservation, the Tribe had to agree to reimburse Pinetop for any tax liability it incurred, in order to avoid losing Pinetop's services. *Bracker*, 448 U.S. at 139-40 & n.7. The Tribe's interest in challenging the Arizona taxes arises, therefore, not out of its capacity as

provided their political organization. The purpose of Congress in enacting section 17 of the Indian Reorganization Act was to empower the Secretary to issue a charter of business incorporation to such tribes to enable them to conduct business through this modern device, which charter cannot be revoked or surrendered except by act of Congress. This corporation, although composed of the same members as the political body, is to be a separate entity, and thus more capable of obtaining credit and otherwise expediting the business of the tribe, while removing the possibility of federal liability for activities of that nature. As a result, *the powers, privileges and responsibilities of these tribal organizations materially differ.*

65 I.D. at 484 (emphasis added).

a sovereign, but out of its involvement as a joint venturer with private companies in logging operations.¹⁸

Since the Tribe is acting as a business corporation, it qualifies as a "citizen or other person" entitled to bring an action under section 1983 to enforce its rights under the Indian timber laws and the due process and equal protection clauses. Our court and other courts have held that private corporations qualify as "citizens" or "other persons" entitled to bring section 1983 actions. See *California Diversified Promotions, Inc. v. Musick*, 505 F.2d 278, 283 (9th Cir. 1974) (corporations can bring section 1983 actions to vindicate their due process rights); *Des Vergnes v. Seekonk Water District*, 601 F.2d 9, 16 (1st Cir. 1979) (corporations are "persons" under section 1983 entitled to bring actions to vindicate their equal protection rights); *Advocates for the Arts v. Thomson*, 532 F.2d 792, 794 (1st Cir.), cert. denied, 429 U.S. 894 (1976); see also *Metropolitan Life Insurance*, 105 S.Ct. at 1683 n.9 ("It is well established that a corporation is a "person" within the meaning of the Fourteenth Amendment."); *Grosjean v. American Press Co.*, 297 U.S. 233, 244 (1936) (corporation is a "person" under the equal protection and due process clauses). In enacting the IRA, Congress intended to enable tribal business enterprises "to enter the white world on a footing of equal competition," 78 Cong. Rec. 11732 (1934); accord *Mescalero Apache Tribe*, 411 U.S. at 157. It presumably did not intend them to be saddled with any legal disabilities greater than those of other

¹⁸ The Supreme Court has suggested that to determine whether a tribe has acted in its business or its sovereign capacity, courts must look beyond the formalities of whether the tribe has actually incorporated itself under section 17, and must look instead to the substance of the conduct in question and the powers actually granted to the tribe in its constitution and bylaws. See *Mescalero Apache Tribe*, 411 U.S. at 157-58 & n.13; see also *Atkinson*, 569 P.2d at 171. But cf. *S. Unique, Ltd. v. Gila River Pima-Maricopa Indian Community*, 138 Ariz. 378, 674 P.2d 1376, 1382 (Ariz. Ct. App. 1983) (citing 1958 Department of Interior opinion and focussing on formalities of whether tribal corporation had separate officers and directors, bank accounts, assets, and property holdings from the tribe's section 16 governmental entity).

private corporations solely because they are affiliated with sovereign tribal governments, but expected instead that private and tribal corporations would be treated identically.¹⁹ Therefore, since a private corporation would be entitled to challenge Arizona's vehicle taxes in a section 1983 action, the Tribe acting as a business corporation is entitled to bring such an action as well.

I also conclude that the Tribe's action is not barred by section 1341, because it qualifies for the "Indian tribes" exception to that provision. The Supreme Court ruled in *Moe* that if an action challenging the imposition of state taxes can be brought under the "Indian tribes" jurisdictional provision, 28 U.S.C. § 1362 (1982), it automatically qualifies for the "Indian tribes" exception to section 1341. See *Moe*, 425 U.S. at 472-75. Based upon the plain language and legislative history of section 1362, and our prior cases interpreting that provision, I conclude that the Tribe is entitled to bring the present action under section 1362, and therefore is not barred by section 1341 from bringing it in federal court.

The plain language of section 1362 authorizes actions "brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior":²⁰ it does not distinguish between the "governmental" tribe provided for in IRA section 16 and the "incorporated tribe" provided for in section 17. 28 U.S.C. § 1362 (emphasis added); 25

¹⁹ For example, Congress intended that tribal business corporations would be able to enter into contracts waiving any possible sovereign immunity from unconsented suits. *Parker Drilling*, 451 F.Supp. at 1131; *Atkinson*, 569 P.2d at 174-75. If tribal corporations did not have such a capacity, they would be at a distinct disadvantage vis-a-vis other corporations, because private parties would be discouraged from entering into contractual agreements with them.

²⁰ The reference to a "duly recognized" governing body in section 1362 merely indicates that the Tribe must have an IRA government organized under IRA section 16. Since tribes can become incorporated under IRA section 17 only if they already have a section 16 government, this reference to section 16 does not mean that Congress intended section 1362 to apply only to tribes acting in a sovereign or governmental capacity.

U.S.C. §§ 476-477. Moreover, nothing in section 1362's legislative history indicates that it was intended to apply only to tribes acting in a sovereign or governmental capacity. See H.R. Rep. No. 2040, 89th Cong., 2d Sess., reprinted in 1966 U.S. Code Cong. & Ad. News 3145, 3146-47. When Congress passed section 1362 in 1966, it was fully aware that Indian tribes can act in both sovereign and proprietary capacities. Therefore, its failure to limit explicitly the scope of section 1362 to actions brought by tribes in their governmental capacity suggests that it intended the provision to encompass actions brought by tribes in their corporate capacity as well. Furthermore, this court has held that "statutes passed for the benefit of Indian tribes, such as section 1362, are to be liberally construed, with doubtful expressions being resolved in the Indians' favor." *Gila River Indian Community v. Henningson, Durham & Richardson*, 626 F.2d 708, 712 (9th Cir. 1980) (citations omitted and emphasis added), cert. denied, 451 U.S. 911 (1981).

This circuit's decision in *Navajo Tribal Utility Authority v. Arizona Department of Revenue*, 608 F.2d 1228 (9th Cir. 1979), also indicates that the Tribe's action is not barred under section 1341. In that case, we held that a utility company that was loosely affiliated with the Navajo Tribe could not bring an action as an "Indian tribe or band" under section 1362, since the utility company was semi-autonomous, three of its seven directors were not members of the Tribe, and the Tribe itself was "not a party" to the action. *Id.* at 1231-32. Although we held that Congress had not intended section 1362 to "provide access to federal courts for subordinate, semi-autonomous entities of Indian tribes and bands," we concluded that:

If the leadership of a tribe or band decides that litigation is necessary to protect the rights of the tribe or band, then section 1362 will provide federal court access to the tribe or band when the other jurisdictional requirements of that section are also met.

Id. at 1232 (emphasis added). We also indicated that "[t]o the extent that [the utility's] interests are identified with the Tribe's, the Tribe itself will be able to protect those inter-

ests, should its leadership decide to do so." *Id.* at 1233 (citing *Mescalero Apache Tribe*, 411 U.S. at 157 n.13) (emphasis in original). ²¹

In the present action, the Tribe has followed the precise guidelines suggested in *Navajo Tribal Utility*. The Tribe has brought the action in its own name on behalf of a tribal enterprise that it totally controls. There is nothing in the record to suggest that FATCO is semi-autonomous, or that its interest diverge from the Tribe's in any way. Thus, the Tribe's action can be brought in federal court under section 1362 and qualifies under the "Indian tribes" exception to section 1341.

Since I conclude that the Tribe was entitled to bring its present section 1983 action in federal court, that its claims based on the Indian reservation timber laws are meritorious, and that its due process and equal protection claims are not "frivolous" under the definition provided in *Hagans v. Lavine*, I would affirm the district court's award of attorney's fees to the Tribe.

²¹ *Navajo Tribal Utility* contains dictum stating that "[s]uits brought by tribal corporations have also been found to fall outside the scope of section 1362." 608 F.2d at 1231. The court cites *Cape Fox Corp. v. United States*, 456 F.Supp. 784, 798 (D. Alaska 1978), *rev'd on other grounds*, 646 F.2d 399 (9th Cir. 1981), and two other cases for that proposition. However, *Cape Fox* is inapposite. It involved "a Native corporation organized under the Alaska Native Claims Settlement Act," *id.* at 797, and thus did not even involve a tribe or band eligible to bring an action under section 1362. *See id.* at 797-98. The other cases are conclusory in their analysis, and do not provide any basis for deciding that the Tribe was not eligible to bring a section 1362 action in this case. *See United States v. State Tax Commission*, 505 F.2d 633, 638 (5th Cir. 1974); *Dodge v. First Wisconsin Trust Co.*, 394 F.Supp. 1124, 1127 (E.D. Wis. 1975).



Appendix B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WHITE MOUNTAIN APACHE TRIBE, an
Indian tribe established pursuant to
Executive Order, et al.,

Plaintiffs-Appellees,

v.

JACK WILLIAMS,¹ Goverjor of the State
of Arizona, et al.,

Defendants,

and

JOHN MCLAUGHLIN, Chairman, Ari-
zona State Transportation Board, et
al.,

Defendants-Appellants.

No. 81-5348

DC No. CV-73-788
PCT WEC

ORDER

Filed
August 20, 1986

Appeal from the United States District Court
for the District of Arizona
Honorable Walter E. Craig, U.S. District Judge, Presiding

Argued and Submitted April 6, 1982
Petition for Rehearing Granted April 25, 1984
Reargued June 18, 1984

Before: FLETCHER, NORRIS, Circuit Judges, and
BURNS,* District Judge.

Judges Norris and Burns have voted to deny the petition for rehearing. Judge Fletcher would grant the petition. Judge Norris votes to reject the suggestion for rehearing en banc. Judge Fletcher would grant it, and Judge Burns recommends it be rejected.

* Honorable James M. Burns, United States District Judge for the District of Oregon, sitting by designation.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED, and the suggestion for a rehearing en banc is REJECTED.

The opinion filed in this case on December 19, 1985, is amended as follows:

Page 3, lines 12-13: Replace "In both the state and federal actions," with "In their federal complaint."

Page 8, lines 1-3: Replace the sentence beginning "Thus, we read *Chapman*" with:

"Under *Chapman*, therefore, the Supremacy Clause standing alone 'secures' federal rights only in the sense that it establishes federal-state priorities; it does not create individual rights, nor does it 'secure' such rights within the meaning of § 1983."

Page 10, lines 9-11: Replace "utility that had ... fees under § 1988" with "utility sought fees under § 1988 after successfully challenging on preemption grounds a state statute imposing a bonding requirement on a nuclear power generating facility."

Page 12, line 6: Delete footnote 6.

Page 13, at the end of the last paragraph: Add Footnote (number 8) as follows:

"The dissent argues that the violation of federal regulations governing the harvest of tribal timber would give rise to a § 1983 action because those statutes were designed to benefit the Tribe. *Dissent* at 5-11. While we disagree that these regulations intended to create rights enforceable under § 1983, it is perhaps more important that the Tribe has never contended—and no court has ever found—that these statutes were ever violated. In our view, therefore, the Tribe fails to clear the first hurdle presented by the *Thiboutot-Pennhurst-Sea Clammers* line of cases. Unlike the situation in *Thiboutot*, or in *Boat-*

owners, no federal statute or regulation was violated by the Arizona tax on plaintiff's logging operations. Rather we have a case in which pervasive federal regulation precludes any state regulation. See *Bracker*, 448 U.S. at 148. Section 1983, as interpreted in *Thiboutot* and its progeny, enforces federal statutory rights only against direct violations of the federal statute in question. See *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, 19 (1981) (*Thiboutot* recognized § 1983 action on behalf of "a private party claiming that a federal statute has been violated under color of state law."); *Pennhurst*, 451 U.S. at 28 (remanding for a determination of whether the state officials violated the DDA).

Page 16: Insert after first paragraph:

Moreover, the Tribe's exemption from state taxation of its timber business does not implicate individual rights; rather the exemption derives from its status as a sovereign.⁹ See *Bracker*, 448 U.S. at 148. Nor did the federal

⁹Indeed, the Tribe's right to invoke the power of federal courts to enjoin Arizona from taxing Pinetop's logging operations rests on considerations of sovereignty, not individual rights. Any plaintiff other than an Indian tribe would be barred by the Tax Injunction Act from bringing a § 1983 action to enjoin state taxation and hence from obtaining attorney's fees under § 1988. While we do not address the question whether the Tribe may bring a § 1983 action to enjoin state taxation, we do note the hoops that the dissent is forced to jump through to make this determination. See *Dissent*, at 19-20 & n.15. The dissent recognizes that a tribe cannot avoid the bar of the Tax Injunction Act in an action based on the rights of individual tribe members. *Id.* at 19 n.15. The dissent also acknowledges that it is doubtful whether a tribe "qua sovereign" would qualify as a "citizen of the United States or other person" entitled to sue under § 1983. *Id.* The dissent purports to overcome these hurdles by opining that here the Tribe may sue under § 1983 because it is acting in this case as an "incorporated business entity". *Id.* at 20. Conventional business entities—such as Pinetop—would, of course, be barred by the Tax Injunction Act from bringing this action in federal court.

legislation create in the Tribe any new interest in the timber; the timber was already "owned by the United States for the benefit of the Tribe ..." *Id.* at 138. The central thrust of the legislation is merely to vest in the Secretary of the Interior authority to regulate the business of harvesting and selling the timber. See 25 U.S.C. §§ 406-407 (1982). In exercising that authority, the Secretary, of course, is required to base his decisions "upon a consideration of the needs and best interests" of the tribal owner. *Id.* § 406(a). However, the critical inquiry—as the Supreme Court made particularly clear in *Sea Clammers*—is whether there is any basis for the judiciary to infer a congressional intent to create rights enforceable under § 1983. 453 U.S. at 19-20. We find no basis for inferring such an intent in this case. For the purpose of applying § 1983 doctrine as enunciated in *Thiboutot* and its progeny, we see nothing remarkable about the fact that Congress intended the federal regulation to protect the interests of the beneficial owner of the timber. Indeed, the kind of regulatory legislation involved in this case is analogous to that involved in *Boatowners* where we also found no "enforceable rights." 716 F.2d at 673-74. There it was the regulation of municipal marinas; here it is the regulation of tribal timber business.

Page 16, line 21: After "policies of the federal government." insert:

To be sure, the Supremacy Clause shielded the Tribe's timber business from state taxation, giving the Tribe a federal defense to any action brought by the state to collect the taxes; it does not follow, however, that in enacting the regulatory legislation, Congress intended to confer on the Tribe the right to use § 1983 as a sword to enjoin the collection of state taxes.

Page 23: Replace old footnote 12 with:

¹³The dissent overlooks this crucial distinction in concluding that the plaintiffs were treated differently from other similarly situated parties in the state because taxes

were being imposed for vehicles used solely on private property. *Dissent*, at 15. In fact, the vehicles involved were operated on both public and private roads. See *Bracker*, 448 U.S. at 154 & n.3.

In pleading their Fourteenth Amendment claim, plaintiffs' allege that the Tribe and its partner Pinetop have a constitutional entitlement to be treated in the same manner as interstate truckers whose state fuel use taxes are apportioned to capture only that portion of fuel use actually attributable to travel on roads within the state. See note 10, *supra*. Thus, the Tribe contended that, for the purpose of the Arizona tax, tribal roads should be treated as though they were in a separate state. Arizona refused to do this, asserting that Pinetop's activities took place solely within Arizona and that Pinetop should be taxed in the same manner as are all other commercial entities that use vehicles on both public and private roads in Arizona. Thus, contrary to the dissent's assertions, plaintiffs were not "singled out" for disparate treatment and taxed "differently from other landowners in the State." *Dissent*, at 13 n.10. Rather, they were taxed in exactly the same fashion as all others who use both public and private roads within Arizona—without apportionment. The only exception was the United States government, which was expressly exempted from the taxes. *Ariz. Rev. Stat.* § 40-641 (1982).

The dissent filed December 19, 1985 is replaced in its entirety by a new dissent filed contemporaneously with this order.



Appendix C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WHITE MOUNTAIN APACHE TRIBE, an
Indian tribe established pursuant to
Executive Order, et al.,

Plaintiffs-Appellees,

v.

JACK WILLIAMS, Governor of the State
of Arizona, et al.,

Defendants,

and

JOHN McLAUGHLIN, Chairman, Ari-
zona State Transportation Board, et
al.,

Defendants-Appellants.

No. 81-5348
DC No. CV 73-788
PCT WEC

[First]

AMENDED
OPINION

Filed
December 19, 1985

[Further Amended
August 20, 1986]

Appeal from the United States District Court
for the District of Arizona

Honorable Walter E. Craig, U.S. District Judge, Presiding

Argued and Submitted April 6, 1982-Pasadena, California

Decided February 7, 1984***

Petition for Rehearing Granted April 25, 1984

Reargued and resubmitted June 18, 1984-Phoenix, Arizona

Before: FLETCHER,* and NORRIS, Circuit Judges, and
BURNS,** District Judge.

NORRIS, Circuit Judge:

* Following the death of Senior Circuit Judge Walter Ely, Judge Fletcher was selected to replace him on the panel.

** Honorable James M. Burns, United States District Judge for the District of Oregon, sitting by designation.

*** Previous opinion decided February 7, 1984 is withdrawn.

This appeal presents the question whether Pinetop Logging Company ("Pinetop") and the White Mountain Apache Tribe (the "Tribe") have stated a claim under 42 U.S.C. § 1983¹ for which attorney's fees are available under the Civil Rights Attorney's Fees Award Act, 42 U.S.C. § 1988 (1976).²

I

The facts of this case are set out more fully in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). In brief, the White Mountain Apache Tribe, which inhabits a reservation in Arizona, organized a tribal enterprise to harvest timber. In 1969 the enterprise entered into a contract with Pinetop Logging Company which provided that Pinetop would perform logging operations on the reservation. *Id.* at 139. In 1971, the Arizona Highway Department and the Arizona Highway Commission assessed a motor carrier license tax and a use fuel tax against Pinetop for activities it performed pursuant to the contract. *Id.* at 139-40. Pinetop paid the taxes under protest, and then brought suit in state court to recover them. *Id.* at 140.

In December 1973, after the Tribe had agreed to reimburse Pinetop for the assessed taxes, *id.* at 140, Pinetop and the Tribe brought suit in federal court, seeking a declaratory judgment and an injunction to prevent any further imposi-

¹ 42 U.S.C. § 1983 states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

² 42 U.S.C. § 1988, the Civil Rights Attorney's Fees Award Act of 1976, provides:

In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

tion of state taxes against Pinetop.³ In both the state and federal actions, Pinetop and the Tribe contended that federal law preempted the state tax laws and that the tax violated their rights to due process and equal protection.

Shortly after commencement of the federal action, the State of Arizona filed a motion requesting the district court to abstain on the ground that "the Arizona tax statutes here in question may be susceptible to an authoritative construction by the state courts in the pending state court action that would avoid or modify the Federal constitutional questions raised." The district court granted the motion, relying on the Supreme Court's decision in *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941), and at the same time granted a consent temporary restraining order forbidding the state agencies to assess further taxes against Pinetop.

Although not required to do so, Pinetop and the Tribe then elected to submit their federal preemption claim to the Arizona courts along with the questions of state law. In May 1975, the Arizona Superior Court rejected all their claims, state and federal, and entered judgment for the state. The federal district court then dismissed the federal action *sua sponte*. In early 1976, however, upon the motion of Pinetop and the Tribe, the district court vacated the dismissal order and entered a consent preliminary injunction pending final outcome of the state proceedings. In 1978, the Arizona Court of Appeals affirmed the state trial court judgment, characterizing the Tribe's arguments as "pure sophistry." *White Mountain Apache Tribe v. Bracker*, 120 Ariz. 282, 290, 585 P.2d 891, 899 (Ct. App. 1978), *rev'd*, 448 U.S. 136 (1980).

After the Arizona Supreme Court declined review, the state returned to federal district court with a motion to quash the consent preliminary injunction and to dismiss the

³ The Anti-Injunction Act, 28 U.S.C. § 1341 (1982), denies federal courts jurisdiction to enjoin state taxes. Federal jurisdiction in this case, however, rests on 28 U.S.C. § 1362, as interpreted in *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, (1976), which creates an exception to the Anti-Injunction Act in actions by Indian tribes to enjoin state taxes.

federal action. The district court denied the state's motion. The United States Supreme Court then reversed the Arizona Court of Appeals, holding that the state taxes were preempted because the comprehensive federal regulatory scheme governing the harvest and sale of tribal timber had occupied the field and because the state taxes would interfere with federal goals and policies. 448 U.S. at 151. Armed with a favorable state court judgment on their federal claims, Pinetop and the Tribe then returned to the district court seeking a declaratory judgment, a permanent injunction and attorney's fees. The district court granted all the relief sought, including attorney's fees of \$206,012.07. The state appeals. We reverse.

II

We first address the question whether Pinetop and the Tribe have stated a claim under § 1983 for which attorney's fees are available under § 1988. Pinetop and the Tribe argue that a claim of preemption of the state's power to tax Pinetop's logging operations on the reservation constitutes a claim of deprivation of "rights, privileges, or immunities secured by the Constitution and laws" within the meaning of § 1983. The Supreme Court decided in *Bracker, supra*, that the federal laws regulating the harvest and sale of tribal timber did preempt the Arizona tax statutes, reasoning that

Where ... the Federal Government has undertaken comprehensive regulation of the harvesting and sale of tribal timber, where a number of policies underlying the federal regulatory scheme are threatened by the taxes respondents seek to impose, and where respondents are unable to justify the taxes except in terms of a generalized interest in raising revenue, we believe that the proposed exercise of state authority is impermissible.

Bracker, 448 U.S. 136, 151 (1980). Although the Court acknowledged that "traditional notions of Indian self-government ... provided an important 'backdrop'" for its analysis, 448 U.S. at 143, it explicitly "based [its decision] on the preemptive effect of the comprehensive federal regulatory scheme" governing the timber harvest. *Id.* at 151 n.15.

The question whether the Supremacy Clause (U.S. Const. art. VI cl. 2) may be used as a sword in bringing a § 1983 action is, of course, different from that decided by the Supreme Court in *Bracker*—whether the Supremacy Clause may be invoked as a shield against the imposition of state taxes on tribal logging operations heavily regulated by the federal government. It is the former question that we must address.

Pinetop and the Tribe argue that because the federal laws that regulate timber operations on tribal lands are intended to benefit the Tribe, the laws may serve as the basis for a § 1983 claim. That the Tribe benefits from the federal timber regulations, however, is not dispositive of the issue. In this case, Pinetop and the Tribe did not prevail in the Supreme Court on a theory that the state had *violated* any of the federal laws or regulations governing logging operations on tribal lands. Rather, the Supreme Court in *Bracker* reasoned that state taxes were preempted because the federal government had pervasively regulated tribal logging operations and because state taxation would interfere with the goals and purposes of the federal regulatory scheme.

Thus the question presented is whether the Tribe's preemption claim, based on federal occupation of a regulatory field and inconsistency of state action with federal goals and policies, will support a civil rights action under § 1983.

A

The Supreme Court has never directly addressed the question whether the Supremacy Clause creates "rights, privileges or immunities" within the ambit of § 1983. In *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600 (1979), however, the Supreme Court did hold that the Supremacy Clause is not a substantive constitutional provision that creates rights within the meaning of 28 U.S.C.

§ 1343 (3). *Id.* at 612-§15.⁴ The Court noted, "even though that Clause is not a source of any federal rights, it does 'secure' federal rights by according them priority whenever they come in conflict with state law. In that sense all federal rights, whether created by treaty, by statute, or by regulation are 'secured' by the Supremacy Clause." *Id.* at 613. Thus, we read *Chapman* to say that the Supremacy Clause alone does not create federal rights actionable under the civil rights laws.

The primary function of the Supremacy Clause is to define the relationship between state and federal law. It is essentially a power conferring provision, one that allocates authority between the national and state governments; thus, it is not a rights conferring provision that protects the individual against government intrusion. The distinction between the two categories of constitutional controls has been enunciated by Professor Choper:

When a litigant contends that the national government (usually the Congress, but occasionally the executive, either alone or in concert with the Senate) has engaged in activity beyond its delegated authority, or when it is alleged that an attempted state regulation intrudes into an area of exclusively national concern, the constitutional issue is wholly different from that posed by an assertion that certain government action abridges a personal liberty secured by the Constitution. The essence of a claim of the latter type—which falls into the individual rights category of constitutional issues . . . —is that no organ of government, national or state, may undertake the challenged activity. In contrast, when a person alleges that one of the federalism provisions of the constitution has been violated, he implicitly concedes that one of the two levels of government—national or state—has the power to engage in the questioned conduct. The core of the argument is simply that

⁴ Section 1343(3) is the statutory provision conferring jurisdiction on federal district courts to hear actions commenced "[t]o redress the deprivation, under color of state law . . . of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights." 28 U.S.C. § 1343(3).

the particular government that has acted is the constitutionally improper one. To put it another way, a federalism attack on conduct of the national government contends that only the states may so act; a federalism challenge to a state practice asserts that only the central government possesses the exerted power; neither claim denies government power altogether.

J. Choper, *Judicial Review in the National Political Process*, 174-75 (1980) (quoted with approval in *United Nuclear Corp. v. Cannon*, 564 F. Supp. 581 (D. R.I. 1983) and *Consolidated Freightways v. Kassel*, 556 F. Supp. 740, 746 (S.D. Iowa 1983) *aff'd* 730 F.2d 1139 (8th Cir.) *cert. denied*, 105 S.Ct. 126 (1984)).

We believe that § 1983 was not intended to encompass those Constitutional provisions which allocate power between the state and federal government. See *Consolidated Freightways v. Kassel*, *supra*, 730 F.2d at 1146 & n.16. The following excerpt from a speech by Representative Shel-labarger, a leading proponent of the 1871 Act, confirms the limited intentions of the framers of the § 1983:

Most of the provisions of the Constitution which restrain and directly relate to the States, such as those in tenth section of first article, that "no State shall make a treaty," "grant letters of marque", "coin money," "emit bills of credit," & c., relate to the divisions of the political powers of the State and General Governments. They do not relate directly to the rights of persons within the States and as between the States and such persons therein. These prohibitions upon the political powers of the States are of such a nature that they can be, and even have been, when the occasion arose, enforced by the courts of the United States declaring void all State acts of encroachment on Federal powers. Thus, and thus sufficiently, has the United States "enforced" these provisions of the Constitution. But there are some that are not of this class. These are where the court secures the rights or liabilities of persons within the States, as between such persons and the States.

Cong. Globe, 42d Cong. 1st Sess., App. 69 (1871). As the Eighth Circuit has observed, "the implication of Rep. Shel-labarger's statement is that § 1983 was enacted to provide a remedy for the latter category of constitutional violation he mentions, and not the former." *Consolidated Freightways v. Kassel*, *supra*, 730 F.2d at 1146 n. 16.

Following the lead of the Supreme Court in *Chapman* and the framers of § 1983, the District of Rhode Island has answered in the negative the question whether the Supremacy Clause will support an action based on § 1983. In *United Nuclear Corp. v. Cannon*, 564 F.Supp. 581 (D. R.I. 1983), a utility that had successfully challenged a state statute imposing a bonding requirement on a nuclear power generating facility on preemption grounds sought fees under § 1988. The court there held that a successful Supremacy Clause challenge to state legislation could not serve as the basis for a § 1983 action, and hence attorney's fees were not available under § 1988. *Id.* at 585-87. The Eleventh Circuit reached the same conclusion in a decision affirming the dismissal of a § 1983 action: "The sole cause of the unconstitutionality was the supremacy clause. Therefore Pirolo is not entitled to a § 1983 remedy for enforcement of the ordinances." *Pirolo v. City of Clearwater*, 711 F.2d 1006, 1011 (11th Cir.), *reh'q denied*, 720 F.2d 688 (11th Cir. 1983).

An analogous question is posed by the invocation of § 1983 in cases based on the dormant Commerce Clause, another constitutional provision that has as its primary function the allocation of power between national and state governments. The most extensive treatment of the issue was provided by the Eighth Circuit in *Consolidated Freightways v. Kassel*, *supra*, a case which a trucking firm sought § 1988 attorney's fees based on its successful dormant Commerce Clause challenge to an Iowa statute banning 65-foot twin trailer trucks. The Eighth Circuit held that

Although the Commerce Clause differs from the Supremacy Clause in that the Commerce Clause is a specific grant of legislative power to Congress, the two clauses are analogous in the sense that both clauses limit the power of a state to interfere with areas of

national concern. Just as the Supremacy Clause does not secure rights within the meaning of § 1983, neither does the Commerce Clause.

Id. at 1144. The Eighth Circuit's reasoning implies that the Supremacy Clause alone will not support a § 1983 action.

A similar question was addressed in *Connor v. Rivers*, 25 F.Supp. 937 (N.D. Ga. 1938), *aff'd*, 305 U.S. 576 (1939). There, the district court decided that a dormant Commerce Clause claim did not provide jurisdiction under § 1343(3)—the provision for federal jurisdiction over civil rights cases irrespective of the amount in controversy—based on an analysis of the history of § 1983.⁵ *Id.* at 938. Because *Connor* was decided at a time when the general federal question jurisdictional provision contained an amount in controversy provision, the suit could only be maintained in federal court if it was maintainable as a civil rights action under § 1343(3). The Supreme Court affirmed *Connor* in a one sentence per curiam opinion noting the lack of the requisite jurisdictional amount in controversy. *Connor* reinforces the conclusion we draw from *Chapman*: power conferring provisions of the Constitution do not create “rights, privileges, or

⁵ At the time *Connor* was decided, § 1983 was codified as 8 U.S.C. § 43 and § 1343(3) was codified as 28 U.S.C. § 41(14).

immunities" within the meaning of § 1983.⁶ Although there are federal court decisions that have held or assumed that the dormant Commerce Clause does support an action under § 1983,⁷ we find them unpersuasive because they do not undertake a substantial analysis of the issue. See *Consolidated Freightways Corp. v. Kassel*, 556 F. Supp., at 744-45.

We thus come down on the side of the weight of authority that preemption of state law under the Supremacy Clause—at least if based on federal occupation of the field or conflict with federal goals—will not support an action under § 1983, and will not, therefore, support a claim of attorney's fees under § 1988.⁸

⁶ We disagree with the dissent that this reading of *Chapman* was effectively foreclosed by *Maher v. Gagne*, 448 U.S. 122, 128-29 n.1 (1980). In *Chapman*, the Court held that only a constitutional right, as distinguished from a statutory right, could give rise to federal jurisdiction under § 1343, and that the Supremacy Clause did not by itself create a constitutional right for this purpose.

In *Maher*, the Court held that this dichotomy between statutory and constitutional rights, while relevant for purposes of federal jurisdiction under § 1343, is not relevant under § 1988 because fees may be awarded under both statutory and constitutional claims cognizable under § 1983. *Maher* does not speak to the issue of which statutory or constitutional claims are enforceable under § 1983 and thus does not foreclose us from interpreting *Chapman* to hold that the Supremacy Clause does not independently create rights cognizable under § 1983. Thus there is no inconsistency between *Maher* and *Chapman*, nor between *Maher* and our holding that plaintiff's preemption claim is not cognizable under § 1983.

⁷ See *Kennecott Corp. v. Smith*, 637 F.2d 181 (3d Cir. 1980); *Confederated Salish and Kootenai Tribes v. Moe*, 392 F. Supp. 1297 (D. Mont. 1974), *aff'd on other grounds*, 425 U.S. 463 (1976); *Confederated Salish and Kootenai Tribes v. Montana*, 392 F. Supp. 1325 (D. Mont. 1974).

⁸ We emphasize that we are not dealing with a case where state action is in actual conflict with the explicit provisions of federal law. Therefore, we need not reach the question whether a Supremacy Clause claim might give rise to a § 1983 action where preemption was based on such actual conflict. Here we deal only with preemption based on federal occupation of the field and conflict between state law and federal goals and policies. For a discussion of the various branches of preemption doctrine, see generally L. Tribe, *American Constitutional Law* 376-89 (1978).

B

Pinetop and the Tribe do not directly confront the question whether the actual ground on which the decision in *Bracker* was made—preemption based on federal “occupation of the field” and “conflict with federal goals”—will support a § 1983 action. Rather, their argument seems to assume that there is a direct conflict between Arizona’s tax and the federal regulations governing timbering on tribal lands. Thus, the Tribe’s argument emphasizes the statutory scheme regulating logging operations on tribal lands—an emphasis that would be appropriate were this a direct conflict case. Because the Arizona tax does not directly violate any federal law or regulation, the Tribe’s argument does not confront the crucial issue.

In developing their argument, Pinetop and the Tribe rely on *Maine v. Thiboutot*, 448 U.S. 1 (1980), in which the Court held that plaintiffs could recover in an action grounded on state violations of the Social Security Act because “the § 1983 remedy broadly encompasses violations of federal statutory as well as constitutional law.” *Id.* at 4. Unlike the situation in *Thiboutot*, no federal statute or regulation was violated by the Arizona tax on Pinetop’s logging operation. Moreover, although some courts broadly interpreted the *Thiboutot* language to mean that § 1983 encompassed all federal statutes, *see, e.g., Yapalater v. Bates*, 494 F.Supp. 1349, 1358 (S.D.N.Y. 1980), *aff’d*, 644 F.2d 131 (2d Cir. 1981), *cert. denied*, 455 U.S. 908 (1982), the Supreme Court has since recognized that not all federal statutes secure rights within the meaning of § 1983. *See Middlesex County Sewerage Authority v. National Sea Clammers Ass’n*, 453 U.S. 1, 19 (1981); *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981).

Recognizing the Supreme Court’s limitation of *Thiboutot* imposed by *Sea Clammers* and *Pennhurst*, Pinetop and the Tribe contend that our decision in *Boatowners and Tenants Association v. Port of Seattle*, 716 F.2d 669 (9th cir. 1983) supports their position. In *Boatowners*, an association of pleasure craft owners charged that the manner of operation of a municipal marina violated the River and Harbor

Improvements Act, 33 U.S.C. §§ 540-633 (1982), and thereby constituted a deprivation of federal statutory rights cognizable under § 1983. We found that although pleasure craft owners certainly benefitted from the general navigational improvements fostered by this federal scheme, "there is no indication that the statute was intended to benefit specially the pleasure craft owners . . . nor that Congress intended to confer federal rights on [them]." *Id.* at 673 (footnote omitted). Accordingly, we held that the pleasure craft owners as a class had no "enforceable rights" as required by *Pennhurst* and *Middlesex County* for maintaining a § 1983 action. Pinetop and the Tribe argue that they are "specially benefitted" by the federal laws and regulations governing timber operations on tribal lands. Thus, they contend that Supremacy Clause preemption by those laws and regulations creates a "right, privilege or immunity" within the meaning of § 1983.

The relevant focus for inquiry, however, is not primarily whether the regulatory scheme was designed to benefit the Indians. Indeed it may have been so designed. Rather the focus must be on the basis of the Supreme Court's decision in *Bracker*—preemption pursuant to the Supremacy Clause. So directed, our inquiry leads to the conclusion that the *Bracker* decision is grounded not on individual *rights* but instead on considerations of *power*—the division of authority between the states and the national government. As the court noted, "At the most general level, the taxes would threaten the overriding *federal objective* of guaranteeing Indians that they will 'receive . . . the benefit of whatever profit [the forest] is capable of yielding . . .'" *Bracker, supra*, 448 U.S. at 149 (citation omitted) (emphasis added). The court continued: "In addition the taxes would *undermine the Secretary's ability* to make the wide range of determinations committed to his authority concerning the setting of fees and rates with respect to the harvesting and sale of tribal timber." *Id.* (emphasis added) Hence, the focus of concern in *Bracker* is state interference with federal policy objectives and the free exercise of authority by federal officials—not individual or tribal rights.

In sum, the Arizona tax on Pinetop's logging operations did not violate any federal statute. Nor is the existence of a federal "goal" or "policy", standing alone, sufficient to create a right cognizable under § 1983. Rather, the tax ran afoul of the Supremacy Clause because it was deemed to interfere in a general way with the authority and policies of the federal government. The Tribe's § 1983 claim, rooted as it is in the power conferring function of the Supremacy Clause, must fail.

We therefore hold that the preemption claim of Pinetop and the Tribe does not give rise to a claim cognizable under § 1983. Accordingly, we conclude that the preemption claim does not support an award of attorney's fees under § 1988.

III

A

Plaintiffs argue in the alternative that even if their preemption claim does not give rise to a fee award under § 1988, they are entitled to fees on the basis of pendent Fourteenth Amendment claims pleaded in their original federal complaint. Plaintiffs rely upon *Maher v. Gagne*, 448 U.S. 122 (1980), for the proposition that a plaintiff who prevails on a claim not cognizable under § 1983 may recover fees under § 1988 on the basis of an unadjudicated constitutional claim that satisfies the "substantiality" test of *Hagans v. Lavine*, 415 U.S. 528 (1974).

We reject this claim principally because plaintiffs have failed to provide us with any meaningful basis for evaluating their Fourteenth Amendment claims. All we have to go on in trying to understand and analyze the claims are the bare allegations in the complaint filed at the outset of the federal court action. Plaintiffs tell us nothing more about the claims other than that the complaint "specifically alleges claims under the Equal Protection Clause, Due Process Clause, and Indian Commerce Clause." Appellee's Answering Brief, at 50-51. We find these allegations, standing alone, far too mea-

ger to enable us to determine whether the claims meet the substantiality test of *Hagans v. Levine*.⁹

The merit of plaintiff's constitutional claims is rendered suspect not only by plaintiff's failure to present this court with anything beyond a reference to the bare bones allegations of the complaint, but also by plaintiff's failure to litigate these claims in the state courts. After the district court entered its *Pullman* abstention order, plaintiffs tendered their preemption claim to the state courts, but not the due process and equal protection claims.¹⁰ Moreover, we agree with *Amici Curiae* that it is difficult to take these Fourteenth

⁹ Plaintiffs pleaded their equal protection claim in the district court as follows:

The denial of equal protection results from the state's attempt to impose unapportioned taxes on the plaintiff's logging operations occurring partly over roads maintained by the State of Arizona, but not on other operations that occur in part over state roads and part over non-state roads. There is no attempt to impose similar unapportioned taxes on carriers that operate partly in the State of Arizona and partly within some other state, and A.R.S. § 40-641 expressly exempts "receipts from property transported under a star route contract of the federal government."

There is no legal basis for the taxation; the taxation is arbitrary and discriminatory, lacking any rational basis. First Amended Complaint, ¶ XXIII.

Plaintiff's due process claim was pleaded in its entirety as follows:

The unapportioned application of these taxes to the plaintiff's operations constitutes a taking in contravention of the Fourteenth Amendment of the United States Constitution as due process is denied. First Amended Complaint, ¶ XXIV.

¹⁰ Although we do not have before us the record in the state court action, we infer that plaintiffs did not tender the Fourteenth Amendment claims to the state courts because plaintiffs have not disputed the state's contention that the plaintiffs "never argued in the state courts nor in the Supreme Court any constitutional violation." (Appellant's Reply Brief, at 16). The record is clear that the claims are not mentioned in the published opinion of the Arizona Court of Appeals, *White Mountain Apache Tribe v. Bracker*, 120 Ariz. 282, 585 P.2d 891 (Ct. App. 1978), *rev'd*, 448 U.S. 136 (1980), and were not raised in the United States Supreme Court. See note 3, *infra*.

Amendment claims seriously "when the plaintiffs themselves did not think enough of the claims to even assert them in their brief to the U.S. Supreme Court."¹¹ *Amici Curiae* Brief, at 8.

Even upon their return to the district court to seek attorney's fees, plaintiffs failed to put any flesh on the bare bones allegations of their complaint. Their motion for fees states merely that their "complaint also alleges violations of the Equal Protection and Due Process Clauses and the Indian Commerce Clause." Plaintiff's Motion for Award of Attorney's Fees Pursuant to 42 U.S.C. § 1988, at 11. The district court awarded fees on the basis of the preemption claim without mentioning the Fourteenth Amendment claims. Findings of Fact and Conclusions on the Plaintiff's Motion for an Award of Attorney's Fees Pursuant to 42 U.S.C. § 1988.

This is not a case where a § 1983 plaintiff seeks attorney's fees on the strength of constitutional claims which were pressed but not adjudicated because of "the longstanding judicial policy of avoiding unnecessary decision of important constitutional issues." *Maier v. Gagne*, 448 U.S. at 133. Rather, this is a case where the constitutional claims were never pressed beyond the original federal complaint until

¹¹ Plaintiff's response to this argument by Amici is grossly misleading. Plaintiffs say that their failure to raise the Fourteenth Amendment claims before the Supreme Court "proves only that the Supreme Court is the master of its docket, [because the Court] granted certiorari *only* on the federal preemption issue, and the plaintiffs briefed nothing more." *Id.* 51-52 (emphasis in original). The clear implication of this explanation is that plaintiffs raised the due process and equal protection claims in their Petition for Certiorari, but that the Court's order granting certiorari excluded those claims from consideration. Upon recalling and reviewing the Petition for Certiorari and the various briefs in *White Mountain Apache Tribe v. Bracker*, we learned what plaintiffs failed to tell us: They did not raise any Fourteenth Amendment claims in their Petition for Certiorari. Moreover, neither due process nor equal protection was mentioned in any of the various briefs filed in the case. Thus the true explanation for plaintiff's failure to argue the Fourteenth Amendment claims to the Supreme Court is not that the Court is the master of its docket, but that plaintiffs never asked the Court to consider those claims.

they were dusted off for use in seeking a fee award under § 1988. For all practical purposes, plaintiffs abandoned their Fourteenth Amendment claims when, following the invocation of *Pullman* abstention by the district court, they failed to tender the claims to the state courts and the United States Supreme Court along with their preemption claim. In contrast, the pendent constitutional claims that provided the basis for a fee award in *Maher* were never abandoned and their substantiality was adjudicated by both the district court and the court of appeals. See *Gagne v. Maher*, 455 F. Supp. 1344, 1348 (D. Conn.), *aff'd*, 594 F.2d 336 (2nd Cir. 1978), *aff'd*, 448 U.S. 122 (1980).

Finally, and perhaps most troublesome, is plaintiff's failure to take advantage of their opportunity in this court for further exposition of their constitutional claims. They provide us with no meaningful analysis; the sole authority relied upon is Justice Stevens' dissent in *White Mountain Apache Tribe v. Bracker*, 448 U.S. at 158, a reliance we find to be misplaced. In the first place, plaintiffs mischaracterize Justice Stevens' dissent. They claim that he and Chief Justice Burger and Justice Rehnquist, who joined in the dissent, "felt that these state taxes *did violate* the due process and equal protection clauses". Appellee's Answering Brief, at 51 (emphasis added). All that Justice Stevens said was that *Pinetop*, as a private corporation doing business with an Indian Tribe, "*may well have have a right to be free from taxation as a matter of due process or equal protection,*" *Bracker*, 448 U.S. at 157 (Stevens, J., dissenting) (emphasis added), if the taxes burden a federal regulatory scheme and "there [is] no governmental interest on the State's part in imposing such a burden." *Id.* at 157. Indeed it would have been remarkable had Justice Stevens expressed the definitive opinion attributed to him by plaintiffs since preemption, not due process or equal protection, was the issue before the Court and the issue on which Justice Stevens disagreed with the majority. Justice Stevens' comments were clearly made solely for the purpose of contrast in the context of emphasizing that whatever valid grounds *Pinetop* might have had

for challenging the state taxes, preemption was not one of them.

The second reason plaintiffs' reliance on Justice Stevens' dissent is misplaced is that the record leaves no room for doubt that Justice Stevens was not addressing the Fourteenth Amendment claims alleged in plaintiffs' federal complaint. Not only were those claims not before the Court in *Bracker*, which involved a review of the state court judgment, but also the dissent does not track the allegations of the federal complaint. Hence, whatever plaintiffs' constitutional theories might be, Justice Stevens was not addressing them. Justice Stevens speculated about conceivable constitutional claims that *Pinetop* as a private corporation might have, whereas the allegations in the complaint focus on the *Tribe's* status as a sovereign to enjoy treatment under Arizona tax laws on a par with the United States and the other states. Perhaps more importantly, Justice Stevens was speculating on possible constitutional implications of taxing vehicles used by *Pinetop* solely on private property, whereas the gravamen of plaintiff's complaint is the state's failure to give plaintiffs beneficial treatment in apportioning the fuel use tax and motor carrier tax based upon travel on public and private roads within the state.¹² Moreover, while plaintiffs are correct in stating that Arizona's use fuel tax is levied "for the purpose of partially compensating the state for the use of its highways," Ariz. Rev. Stat. Ann. §28-1552 (1976), they fail to point out that the tax is expressly levied "in lieu of" direct fuel taxes. Ariz. Rev. Stat. Ann. § 28-1554 (1976). As such, the use fuel tax is analytically indistinguishable from a direct fuel tax. We doubt that plaintiffs

¹² The dissent fails to recognize this crucial distinction in concluding that the plaintiffs were treated differently from other similarly situated parties in the state because taxes were being imposed for vehicles used solely on private property. (Dissent at 9) In fact, the vehicles involved were operated on both public and private roads. See *Bracker*, 448 U.S. at 154 & n.3. Thus the plaintiffs were taxed in exactly the same fashion as all parties who use both public and private roads within the state—without apportionment.

would seriously contend that Arizona can be forced to apportion direct fuel taxes collected at the pump.

In conclusion, we hold on the basis of the record before us that the Fourteenth Amendment claims fail to meet the substantiality test of *Hagans v. Levine* and have been asserted in this action at this late date "solely for the purpose of obtaining fees in [an action] where 'civil rights' of any kind are at best an afterthought." *Maine v. Thiboutot*, 448 U.S. 1, 24 (1980) (Powell, J., dissenting).

B

Finally, plaintiffs' failure to present their Fourteenth Amendment claims to the state courts provides an alternate ground for rejecting them as a basis for awarding fees under § 1988. While we recognize that a federal plaintiff subject to *Pullman* abstention is not required to tender his federal claims to the state courts for adjudication, see *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 421 (1963), we know of no authority suggesting that a federal plaintiff may tender some federal claims while reserving others arising out of the same nucleus of operative facts.¹³ While *England* carves out an exception to principles of res judicata in permitting a federal plaintiff to tender his pending state claims to the state courts and return to federal court on his reserved federal claims in the event he fails to

¹³ The state argues that the district court lacked jurisdiction over the issue of attorney's fees when plaintiffs presented their federal claims to the Arizona courts. The state relies on *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 421, where the Court determined that federal claims presented to the state court under a *Pullman* order may not be relitigated in federal court. *Id.* at 419. We believe, however, that *England* does not present a jurisdictional bar to these claims, but rather announces only a rule of res judicata. Thus, the district court was not deprived of subject matter jurisdiction to hear the fees claim. Because we hold that plaintiffs do not have a § 1983 claim to support an award of fees under § 1988, we need not decide whether the Tribe may return to federal court on their discrete claim for attorney's fees after submitting their preemption claims to the state courts. Nor need we decide whether the Tribe lacks standing to seek a fee award under § 1988 because it is not a "citizen" or "person" within the meaning of § 1983.

get adequate relief in the state action, we see no basis in law or logic for stretching that exception to permit him to reserve some of his federal claims while tendering others to the state courts for adjudication. Because plaintiffs would plainly have been barred by *res judicata* from returning to federal court to litigate its due process and equal protection claims had they failed to obtain a favorable state court judgment, we hold that plaintiffs may not use those claims as a basis for returning to federal court to seek a fee award under § 1988. For all practical purposes, plaintiffs abandoned their due process and equal protection claims when they failed to tender them to the state courts along with their preemption claim.

In sum, we hold that plaintiffs are not entitled to a fee award on the basis of the unadjudicated constitutional claims alleged in their federal complaint.

IV

The state also appeals from the district court order granting a declaratory judgment and a permanent injunction. Plaintiffs contend that the injunction and declaratory judgment were appropriate because the district court's findings reflected a sufficient threat that the state would impose the impermissible taxes even after the Supreme Court barred it from doing so in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980).

In the absence of a controversy "of sufficient immediacy and reality," *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941), a district court lacks jurisdiction to issue a declaratory judgment. *Sellers v. Regents of the University of California*, 432 F.2d 493, 499-500 (9th Cir. 1970), *cert. denied*, 401 U.S. 981 (1971). Here, there is no evidence that state officials intend to ignore the Supreme Court's decision in *Bracker*. The record in fact contains evidence to the contrary. After the Supreme Court's decision, the state filed an affidavit stating that it did not intend to impose any of the disputed taxes on Pinetop and the Tribe. We have no basis for presuming from this record that the Arizona officials will not honor a final state court judgment based upon a decision of the United States Supreme Court.

We therefore hold that the district court erred in concluding that a controversy "of sufficient immediacy and reality" supported the issuance of a declaratory judgment against assessment of the taxes for the years covered by the Supreme Court's decision.

Plaintiffs further contend, however, that the district court properly entered a declaratory judgment on the merits covering the 1968-71 tax period, since assessments covering that period were never adjudicated by either the state courts or the Supreme Court. The state court tax refund action that ultimately reached the Supreme Court dealt only with taxes paid under protest after November 1971, and Pinetop and the Tribe argue that "each year is the origin of a new [tax] liability and a separate cause of action," *Commissioner v. Sunnen*, 333 U.S. 591, 598 (1948). They nevertheless concede that any attempt by the state to impose taxes covering the 1968-71 period would be thwarted by the doctrine of collateral estoppel. Appellees' Answering Brief at 27. See *Montana v. United States*, 440 U.S. 147 (1979). We thus see no justification at this time for entering a declaratory judgment on the merits or granting injunctive relief covering the 1968-71 period.

REVERSED.

WHITE MOUNTAIN APACHE TRIBE v. WILLIAMS,
No. 81-5348

FLETCHER, Circuit Judge, Dissenting:

I respectfully dissent.

I have serious reservations about the majority's conclusion that the Tribe's preemption claim founded on the supremacy clause cannot give rise to a civil rights action under 42 U.S.C. § 1983 (1982). The majority relies for its conclusion on *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600 (1979). Yet, the Supreme Court expressly rejected a similar contention, based upon *Chapman* in *Maher v. Gagne*, 448 U.S. 122 (1980), stating that "neither the language of [42 U.S.C.] § 1988 nor its legislative history provides any basis for importing the distinctions *Chapman* made among § 1983 actions for purposes of federal jurisdiction into the award of attorney's fees by a court that possesses jurisdiction over the claim." *Id.* at 128-29 & n. 11.

Moreover, the majority's conclusion that the Tribe's supremacy clause claim is not cognizable under section 1983 runs contrary to the Supreme Court's language in *Chapman* and the plain language of section 1983. The Supreme Court stated in *Chapman* that "even though th[e Supremacy] Clause is not a source of any federal rights, it does 'secure' federal rights by according them priority whenever they come into conflict with state law." *Chapman*, 441 U.S. at 613 (emphasis added). Section 1983 provides a cause of action to individuals or entities alleging a "deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983 (emphasis added). Thus, the Tribe's claim that it was deprived of federal rights and immunities secured by the Supremacy Clause, on which it prevailed in *White Mountain Apache Tribe v. Bracker*,

448 U.S. 136 (1980), may well give rise to a section 1983 claim.¹

¹ The majority states that "the Supremacy Clause alone does not create federal rights actionable under the civil rights laws," and "does not independently create rights cognizable under § 1983." Majority Opinion at _____ and _____ n.9. Yet under the plain terms of section 1983, it is not necessary that the Supremacy Clause itself create rights actionable under Section 1983; it is necessary only that it secure federal rights and immunities. See 42 U.S.C. § 1983. The Supreme Court confirmed in *Chapman* that the Supremacy Clause "does 'secure' federal rights ... whenever they come into conflict with state law." *Chapman*, 441 U.S. at 613.

In *Bracker*, the Supreme Court appears to have concluded that the Tribe had a federal right of exemption and an immunity from the challenged Arizona taxes. The Court stated that:

[T]he [challenged] taxes would threaten the overriding federal objective of guaranteeing Indians that they will "receive ... the benefit of whatever profit [the forest] is capable of yielding ..." 25 C.F.R. § 141.3(a)(3) (1979). Underlying the federal regulatory program rests a policy of assuring that the profits derived from timber sales will inure to the benefit of the Tribe, subject only to administrative expenses incurred by the federal government. That objective is part of the general federal policy of encouraging Tribes "to revitalize their self-government" and to assume control over their "business and economic affairs." *Mescalero Apache Tribe v. Jones*, 411 U.S. at 151. ... [T]he federal government has ... expressed a firm desire that the Tribe should retain the benefits derived from the harvesting and sale of reservation timber.

Bracker, 448 U.S. at 149.

To the extent that the Supreme Court has recognized a federal right or immunity possessed by the Tribe and "secured" by the Supremacy Clause, the Tribe is entitled to enforce that right or immunity in a section 1983 action. See *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1, 19 (1981); *Boatowners and Tenants Association, Inc. v. Port of Seattle*, 716 F.2d 669, 673 & n.5 (9th Cir. 1983) (suggesting that if regulatory scheme is "intended to benefit specially" a particular class or set of entities, it may provide members of that class with rights or immunities enforceable under section 1983); see also *Chase v. McMasters*, 573 F.2d 1011, 1017 (8th Cir.) (municipality's violation of section 5 of the Indian Reorganization Act, 25 U.S.C. § 465 (1982), which authorizes Indians to convey property in trust to the Secretary of the Interior in order to avoid local property taxes, can give rise to Section 1983 action, because it constitutes an interference with the "unique legal relationship between the federal government and Tribal Indians"), *cert. denied*, 439 U.S. 965 (1978).

However, I find it unnecessary to determine whether the Tribe's preemption claim provides a basis for the district court's award of attorney's fees, because I conclude that the district court's award is warranted based on the Tribe's due process and equal protection claims. I reject the majority's conclusions that these fourteenth amendment claims are procedurally barred, or that they are frivolous, "difficult to take . . . seriously," or so "insubstantial" that they will not support an attorney's fees award under section 1988.

The Tribe raised these claims in its district court complaint; they arise out of the same underlying facts as the claims upon which the Tribe prevailed in *Bracker*; and the Tribe has never abandoned them. I conclude that the Tribe is entitled to bring a section 1983 action in federal court based upon these claims.² I do not consider them to be frivolous, and therefore find them to satisfy the "substantiality" test of *Hagans v. Lavine*, 415 U.S. 528 (1974), and to justify the district court's award of section 1988 attorney's fees in this action. See *Maher*, 448 U.S. at 132 n.15 (citations omitted).

A. The Tribe's failure to Litigate Its Due Process and Equal Protection Claims in *Bracker*

The majority contends that because the Tribe failed to raise or litigate its due process and equal protection claims before the Arizona state courts and the United States Supreme Court in the *Bracker* case after the district court entered its *Pullman* abstention order, the Tribe effectively "abandoned" those claims for the purposes of this action. Such a conclusion is contrary to the Supreme Court's deci-

² Because I reject the majority's conclusions that the Tribe's due process and equal protection claims are procedurally barred and frivolous, I am required to address two issues that the majority is not required to resolve. First, I must determine whether, under the circumstances involved in this case, the Tribe qualifies as a "citizen" or "person" entitled to bring an action under Section 1983. I conclude that it does. See Section C, *infra*. Second, I must determine whether the Tribe's present section 1983 action can be brought in federal court under the "Indian tribes" exception to the Tax Anti-Injunction Act, 28 U.S.C. § 1341 (1982). I conclude that it can. See *id*.

sion in *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964), and to our court's decision in *Tovar v. Billmeyer*, 609 F.2d 1291 (9th Cir. 1979).

In *England*, the Supreme Court held that in cases involving abstention, "[i]f a party freely and without reservation submits his federal claims for decision by the state courts, litigates them there, and has them decided there, then . . . he has elected to forgo his right to return to the District Court." *England*, 375 U.S. at 419 (emphasis added). In the present case, when the district court entered its abstention order, the Tribe expressly indicated its intention to reserve certain of its federal claims for later resolution by the district court and it did not litigate its due process and equal protection claims in the state courts or the Supreme Court. By this conduct, the Tribe preserved its fourteenth amendment claims, and cannot be found to have abandoned them.

Our court stated in *Tovar* that "[a] free and unreserved submission to the state court of all federal claims for complete and final resolution is necessary to bar return to the federal court." *Tovar*, 609 F.2d at 1294 (emphasis added). The majority concedes that the Tribe never freely submitted its fourteenth amendment claims for resolution in the

Bracker case.³ Thus, these claims were properly before the district court when it awarded the Tribe section 1988 attorney's fees.

B. Substantiality of the Tribe's Due Process and Equal Protection Claims

The majority asserts that even if the Tribe's due process and equal protection claims were properly before the district court, they are frivolous and do not satisfy the "substan-

³ The majority asserts that although *England* creates an exception to traditional *res judicata* principles, it is essentially an all-or-nothing proposition: parties, like the Tribe, may not raise some, but not all, of their federal claims in state court while reserving their remaining federal claims. No such requirement has ever been imposed under the *England* doctrine. We stated in *Tovar* that "[a] free and unreserved submission . . . of all federal claims . . . is necessary to bar return to the federal court." 609 F.2d at 1294 (emphasis added). The word "all" would be superfluous if the majority's interpretation of *England* were correct.

The majority also criticizes the "Tribe for maintaining that its failure to raise its fourteenth amendment claims before the Supreme Court was due to the limited nature of the Court's order granting certiorari in *Bracker*." This issue is irrelevant to the disposition of the present case. The Tribe did not litigate its fourteenth amendment claims in the Arizona state courts, and therefore could not have raised them in the *Bracker* appeal. Yet, as noted above, based upon the decisions in *England* and *Tovar*, this tactical decision by the Tribe does not preclude it from relying on those claims as a basis for section 1988 attorney's fees in the present action.

tiality test of *Hagans v. Lavine*, 415 U.S. 528 (1974).”⁴ I disagree. The Supreme Court provided in *Hagans* that

claims are constitutionally insubstantial *only if the prior decisions inescapably render the claims frivolous*; previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial. . . . A claim is insubstantial only if “‘its unsoundness so clearly results from . . . previous decisions . . . as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy.’”

Hagans, 415 U.S. at 537-38 (quoting *Goosby v. Osser*, 409 U.S. 512, 518 (1973)) (citations omitted and emphasis

⁴ The majority states that the allegations concerning the Tribe's fourteenth amendment claims in its complaint are “far too meager” for this court to determine whether or not they satisfy the *Hagans* “substantiality” test and support the district court's award of attorney's fees. I do not agree. While the Tribe's presentation of these claims in its complaint and subsequent pleadings has not been especially detailed, a reading of the Tribe's pleadings, along with the Supreme Court's opinions in *Bracker* and recent due process and equal protection cases, makes it clear that the Tribe's fourteenth amendment claims satisfy the *Hagans* test. See Section B, *infra*.

However, given that the majority believes that it has no “meaningful basis for determining whether [the Tribe's] fourteenth amendment claims . . . support a fee award under § 1988,” I find it inexplicable that the majority does not remand this case for further development on this issue. Instead, the majority has simply discarded a considered fee-award judgment by the district court and vacated a \$206,000 award to the Tribe.

The majority states that the district court awarded attorney's fees based exclusively on the Tribe's preemption claims and “did not [even] mention the [Tribe's] constitutional claims in making its fee award, but this is simply not true. The district court's findings and conclusions on the Tribe's section 1988 request plainly state that the court awarded attorney's fees based on *all* the Tribe's section 1983 claims. The court did not single out any one claim for special mention. Even if the district court's award had been based on the Tribe's preemption claim, we are required to affirm the award as long as the Tribe's fourteenth amendment claims are not frivolous.

added).⁵ I conclude that the Tribe's due process and equal protection claims are not insubstantial or frivolous under *Hagans*' definition.

The dissenting opinion in *Bracker*, 448 U.S. at 153, subscribed to by three Justices, concluded that the Tribe and "Pinetop may well have a right to be free from [the challenged Arizona] taxation as a matter of due process or equal protection." *Id.* at 158 & n.7 (1980) (Stevens, J., dis-

⁵ Although purporting to apply the *Hagans* test in evaluating the district court's fee award, the majority questions whether the Tribe's fourteenth amendment claims have "sufficient merit" to justify a section 1988 award. This suggests that the majority has applied too strict a standard in reviewing the Tribe's fourteenth amendment claims, and has not simply examined whether those claims are "inescapably . . . frivolous," as *Hagans* requires. *Hagans*, 415 U.S. at 537-38.

senting).⁶ It seems unlikely that one-third of the Supreme Court would make such a statement if, as the majority suggests, previous "decisions . . . leave no room for the inference that the questions [involved can] be the subject of controversy." *Hagans*, 415 U.S. at 538 (citations omitted).

The majority opinion in *Bracker* demonstrates that all the necessary elements are present for the Tribe, acting in its corporate capacity,⁷ to raise viable due process and equal protection challenges to Arizona's vehicle taxes. First, the

⁶ The majority contends that the statements in the *Bracker* dissent concerning possible due process and equal protection claims arising out of the challenged Arizona taxes do not support the Tribe's fourteenth amendment claims, because these statements refer to claims potentially available to "Pinetop, as a private corporation, rather than to claims potentially available to the Tribe." The majority maintains that the Tribe's fourteenth amendment claims, in contrast to Pinetop's, arise out of the Tribe's "status as a sovereign" and are based on the assumption that the Tribe is entitled to receive "beneficial [or preferential] treatment" above and beyond that of other individuals and entities.

However, the majority has misinterpreted the Tribe's due process and equal protection claims and has confused them with its preemption claim. Although the Tribe's preemption claim rests on the assumption that the State must accord *special* treatment to the Tribe's timberlands and cannot regulate them to the same extent as it regulates other timberlands, *see generally* footnote 1, *supra*, the Tribe's fourteenth amendment claims are based on the allegation that Arizona has impermissibly discriminated against the Tribe and singled it out by taxing it differently from other landowners in the State without any apparent rational justification.

The Tribe has raised its fourteenth amendment claims in its capacity as a corporation seeking to make commercial use of its reservation lands. *See* Section C, *infra*. Its due process and equal protection claims are identical to those that any corporate entity would raise if it were treated disparately under a state taxing scheme. These claims have nothing to do with the Tribe's status as a sovereign entity. They arise out of the Tribe's joint commercial venture with Pinetop, *see, id.*, and are therefore identical to any fourteenth amendment claims that Pinetop would be entitled to raise in its corporate and proprietary capacity. Therefore, any statements in the *Bracker* dissent relating to possible due process and equal protection claims available to Pinetop would be equally applicable to the Tribe.

⁷ *See* the discussion relating to the Tribe's corporate or proprietary capacity in Section C, *infra*.

Bracker majority noted that "it is undisputed that the economic burden of the asserted taxes will ultimately fall on the Tribe." 448 U.S. at 151. Thus, the Tribe has standing to challenge the Arizona taxes and has alleged that imposition of these taxes deprived it of property under the fourteenth amendment. See *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975); *Fuentes v. Shevin*, 407 U.S. 67, 86 (1972).

Second, Arizona conceded during oral argument in the *Bracker* case that its taxes do not apply to the use of vehicles on private roads and property in the state. *Id.* at 154-55 nn.3-4 (Stevens, J., dissenting) (quoting Supreme Court transcript). Yet the *Bracker* majority found that Arizona had taxed the use of vehicles by the Tribe and Pinetop in operations "conducted solely on the Fort Apache Reservation" and on roads that were "built, maintained, and policed exclusively by the Federal Government, the Tribe, and its contractors." *Id.* at 150. Thus, Arizona treated the Tribe differently from other, similarly-situated parties in the state

who operate vehicles on non-state-maintained roads and private property.⁸

Finally, the *Bracker* majority reiterated throughout its opinion that the State of Arizona is "unable to identify any regulatory function or service performed by the State that would justify the assessment of taxes for activities on Bureau and tribal roads within the reservation." *Id.* at 148-49, 150-51. This suggests that there may well be no rational basis for or legitimate purpose furthered by Arizona's disparate treatment of the Tribe and other parties. *See Williams v. Vermont*, 105 S.Ct. 2465, 2472 (1985); *Metropolitan Life Insurance Co. v. Ward*, 105 S.Ct. 1676, 1683 (1985). Thus, the *Bracker* majority concluded that imposition of the challenged Arizona taxes deprived the Tribe of property, that in imposing these taxes, Arizona treated the Tribe differently from other, similarly-situated entities, and that Arizona has failed to identify any rational basis for doing so. I conclude, as a result, that the due process and equal protec-

⁸ The majority asserts that because the challenged Arizona fuel-use tax "is expressly levied 'in lieu of' direct fuel taxes," it is therefore "analytically indistinguishable from a direct fuel tax." The majority contends as a result that the Tribe cannot challenge Arizona's unequal imposition of the fuel-use tax, because it could "not seriously contend that Arizona should be forced to apportion direct fuel taxes collected at the pump."

Such an argument is seriously flawed. The fact that a state could conceivably tax an individual or entity under one tax scheme does not automatically entitle the state to impose taxes upon that individual or entity under a different tax scheme when other similarly situated individuals or entities are not being taxed. Otherwise, there could never be due process or equal protection challenges to state taxing schemes, because it would always be possible to hypothesize situations in which the victims of alleged discriminatory treatment could be taxed.

Arizona chose to adopt its fuel-use tax. It is responsible for administering that tax in an evenhanded, non-discriminatory fashion that will withstand due process and equal protection scrutiny. If Arizona chooses to change to a direct fuel tax so that it can tax the Tribe and other private landowners for fuel used on non-state-maintained roads and private property, it certainly would be entitled to do so. However, the fact that Arizona could conceivably change its tax system does not affect the resolution of this case.

tion claims raised by the Tribe are not frivolous or foreclosed by prior decisions. *See, e.g., Williams*, 105 S.Ct. at 2471-74; *Metropolitan Life Insurance Co.*, 105 S.Ct. at 1679-84.

C. The Tribe's Capacity to Bring a Section 1983 Action In Federal Court

Since the Tribe has raised viable claims under the due process and equal protection clauses, it is entitled to recover section 1983 attorney's fees if (1) it has the capacity to bring a section 1983 action based on those claims; and (2) such an action is not barred by the Tax Anti-Injunction Act, 28 U.S.C. § 1341 (1982).⁹ Although not every action by an Indian tribe challenging the imposition of state taxes will satisfy these two requirements, I conclude, based on the circumstances of this case and the capacity in which the Tribe initiated this litigation, that the present action satisfies both

⁹ The Tax Anti-Injunction Act provides that:

[Federal] district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

28 U.S.C. § 1341. Since the Anti-Injunction Act applies only to actions brought in *federal court*, had the Tribe chosen to raise its section 1983 claims in the parallel state court action, rather than simply raising its due process and equal protection arguments as defenses, section 1341 would not have served as bar to its section 1983 claims.

requirements, and that the Tribe is entitled to recover section 1988 attorney's fees.¹⁰

¹⁰ A tribe's ability to bring an action in federal court challenging the imposition of state taxes depends on the capacity in which the tribe initiates the litigation and the basis of the tribe's standing to bring such a challenge. The Supreme Court indicated in *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976), that in actions involving challenges to the imposition of state taxes, the source of parties' standing to bring the actions must coincide with the basis on which subject-matter jurisdiction is asserted. See *Id.* at 468 n.7.

In the present action, the Tribe's standing is based upon its proprietary, corporate activities; as a result, in order to maintain its action, the Tribe must be entitled to bring a section 1983 action and must qualify for the "Indian tribes" exception to section 1341 while acting in its corporate capacity. The Tribe could also have challenged Arizona's taxes in its sovereign, governmental capacity, if the imposition of those taxes adversely affected its exercise of its powers of self-government, or if they were imposed on the Tribe's governmental operations. See *id.*; see also *Assiniboine & Sioux Tribes v. Montana*, 568 F.Supp. 269, 276 (D. Mont. 1983) (tribal vehicles had to be taxed for Tribe to have standing to seek refund under *Moe*). Such an action would clearly not be barred by section 1341. See, e.g., *Moe*, 425 U.S. at 474-75. However, it is doubtful whether the Tribe qua sovereign would qualify as a "citizen of the United States or other person" eligible to bring an action under section 1983 for deprivation of its rights, privileges, or immunities. See *City of Safety Harbor v. Birchfield*, 529 F.2d 1251, 1253-55 (5th Cir. 1976) (municipality is not a "person" entitled to bring section 1983 action); *Buda v. Sarbe*, 406 F.Supp. 399, 403 (E.D. Tenn. 1974) (a "state is not a '... citizen of the United States or other person within the jurisdiction thereof ...' within the contemplation of 42 U.S.C. § 1983."); *Spence v. Boston Edison Co.*, 390 Mass. 604, 459 N.E.2d 80, 83-84 (1983) (city housing authority cannot bring section 1983 action to enforce due process or equal protection rights); see also *City of South Lake Tahoe v. California Tahoe Regional Planning Agency*, 625 F.2d 231, 233 (9th Cir.) ("[p]olitical subdivisions of a state may not challenge the validity of a state statute under the Fourteenth Amendment."), *cert. denied*, 449 U.S. 1039 (1980).

Finally, the Tribe could have brought an action challenging Arizona's vehicle taxes as a representative of or as *parens patriae* for its individual

members, in order to vindicate their individual rights. See, e.g., *Assiniboine & Sioux Tribes*, 568 F.Supp. at 277; see also *Little Earth of United Tribes, Inc. v. United States Department of Housing and Urban Development*, 584 F.Supp. 1292, 1295-97 (D.Minn. 1983). When acting solely in a representative capacity, a tribe's standing is based exclusively upon the standing of its individual members: it simply raises claims that they could raise individually, and essentially stands in the same position as they would, had they brought the action collectively. See *United States v. Students Challenging Regulatory Agency Procedures (S.C.R.A.P.)*, 412 U.S. 689, 683-90 (1973); *Sierra Club v. Morton*, 405 U.S. 727, 735-39 (1972); see also *Assiniboine & Sioux Tribes*, 568 F.Supp. at 277. Thus, the Tribe would clearly be entitled to bring a section 1983 action based upon alleged violations of its members' due process and equal protection rights. See, e.g., *Thompson v. New York*, 487 F.Supp. 212, 216 (N.D.N.Y. 1979) (individual Indians can maintain section 1983 actions based on alleged violations of their equal protection rights).

However, it would appear inconsistent with our prior decisions to allow tribes suing merely as representatives of their individual members to avoid the bar of section 1341. We have held that the "Indian tribes" exception to section 1341 does not apply to suits brought by individual Indians, see *Comenout v. Washington*, 722 F.2d 574, 577 (9th Cir. 1983); *Dillon v. Montana*, 634 F.2d 463, 469 (9th Cir. 1980), or by Indian entities that are less than full-scale "Indian tribe[s] or band[s]," as that phrase is used in 28 U.S.C. § 1362 (1982). See *Navajo Tribal Utility Authority v. Arizona Department of Revenue*, 608 F.2d 1228, 1231 (9th Cir. 1979). In light of these decisions, authorizing Indian tribes to bring representative actions in federal court challenging the collection of state taxes on behalf of their members could undermine and perhaps trivialize section 1341 by enabling individual Indians to avoid its effect simply by having their tribe bring a "representative" action on their behalf. See *Assiniboine & Sioux Tribes*, 568 F.Supp. at 277. Moreover, the Supreme Court noted in *Moe* that if standing to bring an action challenging the imposition of state taxes is based exclusively upon the rights of individual tribe members, those tribal members must be authorized to invoke the jurisdiction of the federal courts in their own right. See *Moe*, 425 U.S. at 468 n.7 (citing *Zahn v. International Paper Co.*, 414 U.S. 291, 294 (1973)).

The Tribe brought this action in its capacity as an incorporated business entity under section 17 of the Indian Reorganization Act (IRA), 25 U.S.C. § 477 (1982):¹¹ its

¹¹ Under section 17 of the Indian Reorganization Act (IRA), 25 U.S.C. § 477 (1982), Indians are authorized to request the Secretary of the Interior to issue charters of incorporation to their tribes once their tribes have adopted constitutions and bylaws and organized tribal governments under section 16 of the IRA, 25 U.S.C. § 476 (1982). Congress enacted section 17 specifically "to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism," *Mescalero Apache Tribe v. Jones*, 411 U.S., 145, 152 (1973) (quoting H.R.Rep. No. 1804, 73rd Cong. 2d Sess., 1 (1934)): it sought to promote the organization of tribal business enterprises and to enable these enterprises "to enter the white world on a footing of equal competition." 78 Cong. Rec. 11732 (1934); accord *Mescalero Apache Tribe*, 411 U.S. at 157 (quoting above passage from Congressional Record).

The Supreme Court and other courts have recognized a distinction between tribes acting as business entities and as sovereign, governmental entities, and have consistently indicated that the capacity in which a tribe is acting helps to determine its legal rights, privileges, and immunities. See *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 105 S.Ct. 1900, 1903 (1985) (distinguishing between tribe's "role as commercial partner" and its "role as sovereign"); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 145-47 (1982) (noting same distinction in determining that tribe was entitled to impose taxes in its sovereign capacity upon parties with whom it had lease agreements); *Parker Drilling Co. v. Metlakatla Indian Community*, 451 F.Supp. 1127, 1131-35 (D.Alaska 1978); *Atkinson v. Haldane*, 569 P.2d 151, 174-75 (Alaska 1977) (noting that a tribe's "section 16 governmental unit and [its] section 17 corporate unit are distinct legal entities" and concluding that section 16 units have tribal sovereign immunity, and that section 17 units may waive their immunity); *Request for Interpretative Opinion on the Separability of Tribal Organizations Organized Under Section 16 and 17 of the Indian Reorganization Act*, 65 I.D. 483, 484 (1958) (Solicitor's report analyzing IRA's legislative history and concluding that "the powers, privileges and responsibilities of [section 16 and 17] tribal organizations materially differ"). In analyzing the IRA's legislative history, the Solicitor concluded that:

The purpose of Congress in enacting section 16 of the Indian Reorganization Act was to facilitate and to stabilize the tribal organization of Indians residing on the same reservation, for their common welfare. It provided their political organization. The purpose of Congress in enacting section 17 of the Indian Reorganization Act was to empower

standing to challenge Arizona's taxes is based on the tax burden it incurred while operating in a proprietary capacity. See *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 468 n.7 (1976) (focussing on basis of tribe's standing to challenge particular state taxes); see also *Assiniboine & Sioux Tribes*, 568 F.Supp. at 276-77. The Tribe's first amended complaint states that "[t]he forestry operations of the tribe are run by the Fort Apache Timber Company [FATCO], a wholly owned business of the White Mountain Apache Tribe The lumbering operation is the Tribe's principal industrial activity and provides a substantial portion of the revenue and employment for the tribe and its members." FATCO has contractual agreements with six logging companies, including Pinetop, under which the companies fell trees, cut them to specified size, and transport them to FATCO's sawmill for a contractually-specified fee; when Arizona assessed taxes on Pinetop for its use of roads within the White Mountain Apache Reservation, the Tribe had to agree to reimburse Pinetop for any tax liability it incurred, in order to avoid losing Pinetop's services. *Bracker*, 448 U.S. at 139-40 & n.7. The Tribe's interest in challenging the Arizona taxes arises, therefore, not out of its capacity as

the Secretary to issue a charter of business incorporation to such tribes to enable them to conduct business through this modern device, which charter cannot be revoked or surrendered except by act of Congress. This corporation, although composed of the same members as the political body, is to be a separate entity, and thus more capable of obtaining credit and otherwise expediting the business of the tribe, while removing the possibility of federal liability for activities of that nature. As a result, the powers, privileges and responsibilities of these tribal organizations materially differ.

65 I.D. at 484 (emphasis added).

a sovereign, but out of its involvement as a joint venturer with private companies in logging operations.¹²

Since the Tribe is acting as a business corporation, it qualifies as a "citizen or other person" entitled to bring an action under section 1983 to enforce its due process and equal protection rights. Our court and others have held that private corporations qualify as "citizens" or "other persons" entitled to bring section 1983 actions. See *California Diversified Promotions, Inc. v. Musick*, 505 F.2d 278, 283 (9th Cir. 1974) (corporations can bring section 1983 actions to vindicate their due process rights); *Des Vergnes v. Seekonk Water District*, 601 F.2d 9, 16 (1st Cir. 1979) (corporations are "persons" under section 1983 entitled to bring actions to vindicate their equal protection rights); *Advocates for the Arts v. Thomson*, 532 F.2d 792, 794 (1st Cir.), cert. denied, 429 U.S. 894 (1976); see also *Metropolitan Life Insurance*, 105 S.Ct. at 1683 n.9 ("It is well established that a corporation is a "person" within the meaning of the Fourteenth Amendment."); see also *Grosjean v. American Press Co.*, 297 U.S. 233, 244 (1936) (corporation is a "person" under the equal protection and due process clauses). In passing the IRA, Congress intended to enable tribal business enterprises "to enter the white world on a footing of equal competition." 78 Cong. Rec. 11732 (1934); accord *Mescalero Apache Tribe*, 411 U.S. at 157. It presumably did not intend them to be saddled with any legal disabilities beyond those of other pri-

¹² The Supreme Court has suggested that to determine whether a tribe has acted in its business or its sovereign capacity, courts must look beyond the formalities of whether the tribe has actually incorporated itself under section 17, and must look to the substance of the conduct in question and the powers actually granted to the tribe in its constitution and bylaws to determine whether the conduct involved is proprietary or governmental in nature. See *Mescalero Apache Tribe*, 411 U.S. at 157-58 & n.13; see also *Atkinson*, 569 P.2d at 171. But cf. *S. Unique, Ltd. v. Gila River Pima-Maricopa Indian Community*, 138 Ariz. 378, 674 P.2d 1376, 1382 (Ariz. Ct. App. 1983) (citing 1958 Department of Interior opinion and focussing on formalities of whether tribal corporation had separate officers and directors, bank accounts, assets, and property holdings from the tribe's section 16 governmental entity).

vate corporations solely because they are affiliated with sovereign tribal governments, but expected instead that private and tribal corporations would be treated identically.¹³ Therefore, since a private corporation would be entitled to challenge Arizona's vehicle taxes in a section 1983 action, the Tribe acting as a business corporation is entitled to bring such an action as well.

I also conclude that the Tribe's action is not barred from the federal courts by section 1341, because it qualifies for the "Indian tribes" exception to that provision. The Supreme Court's decision in *Moe* indicates that if an action can be brought in federal court under the "Indian tribes" jurisdictional provision, 28 U.S.C. § 1362 (1982), it can automatically be brought there under the "Indian tribes" exception to section 1341. *See Moe*, 425 U.S. at 472-75. Based upon the plain language and legislative history of section 1362, and our prior cases interpreting that provision, I conclude that the Tribe is entitled to bring its action under section 1362, and therefore is not barred by section 1341 from bringing it in federal court.

The plain language of section 1362 authorizes actions "brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior":¹⁴ it does not distinguish between the "governmental" tribe provided for in IRA section 16 and the "incorporated tribe" provided for in section 17. 28 U.S.C. § 1362 (emphasis added); 25

¹³ For example, Congress intended that tribal business corporations would be able to enter into contracts waiving any possible sovereign immunity from unconsented suits. *Parker Drilling*, 451 F.Supp. at 1131; *Atkinson*, 569 P.2d at 174-75. If tribal corporations did not have such a capacity, they would be at a distinct disadvantage vis-a-vis other corporations, because private parties would be discouraged from entering into contractual agreements with them.

¹⁴ The reference to a "duly recognized" governing body in section 1362 merely indicates that the Tribe must have an IRA government organized under IRA section 16. Since tribes can become incorporated under IRA section 17 only if they already have a section 16 government, this reference to section 16 does not mean that Congress intended section 1362 to apply only to tribes acting in a sovereign or governmental capacity.

U.S.C. §§ 476-477. Nothing in section 1362's legislative history indicates that it was intended to apply only to tribes acting in a sovereign or governmental capacity. See H. Rep. No. 2040, 89th Cong., 2d Sess., *reprinted in* 1966 U.S. Code Cong. & Ad. News 3145, 3146-47. When Congress passed section 1362 in 1966, it was fully aware that Indian tribes could act in both sovereign and proprietary capacities; therefore, its failure to limit explicitly the scope of section 1362 to actions brought by tribes in their governmental capacity suggests that the provision was intended to encompass actions brought by tribes in their corporate capacity as well. Furthermore, this court has held that "statutes passed for the benefit of Indian tribes, such as section 1362, are to be liberally construed, with doubtful expressions being resolved in the Indians' favor." *Gila River Indian Community v. Henningson, Durham & Richardson*, 626 F.2d 708, 712 (9th Cir. 1980) (citations omitted), *cert. denied*, 451 U.S. 911 (1981).

This court's decision in *Navajo Tribal Utility Authority v. Arizona Department of Revenue*, 608 F.2d 1228 (9th Cir. 1979), also indicates that the Tribe's action is not barred under section 1341. In that case, we held that a utility company that was loosely affiliated with the Navajo Tribe could not bring an action as an "Indian tribe or band" under section 1362, since the utility company was semi-autonomous, three of its seven directors were not members of the Tribe, and the Tribe itself was "not a party" to the action. *Id.* at 1231-32. We concluded that Congress had not intended section 1362 to "provide access to federal courts for subordinate, semi-autonomous entities of Indian Tribes and bands," but concluded that:

If the leadership of a tribe or band decides that litigation is necessary to protect the rights of the tribe or band, then section 1362 will provide federal court access to the tribe or band when the other jurisdictional requirements of that section are also met.

Id. at 1232 (emphasis added). We also indicated that "[t]o the extent that [the utility's] interests are identified with the Tribe's, the Tribe itself will be able to protect those interests, should its leadership decide to do so." *Id.*, at 1233

(citing *Mescalero Apache Tribe*, 411 U.S. at 157 n.13 (emphasis in original)).¹⁵

In the present action, the Tribe has followed the precise guidelines suggested in *Navajo Tribal Utility*. The Tribe has brought the action in its own name on behalf of a tribal enterprise that it totally controls. There is nothing in the record to suggest that FATCO is semi-autonomous, or that its interests diverge from the Tribe's in any way. Thus, the Tribe's action can be brought in federal court under section 1362 and qualifies under the "Indian tribes" exception to section 1341.

Since I conclude that the Tribe was entitled to bring the present section 1983 action in federal court, and that the Tribe's due process and equal protection claims are not "frivolous" under the definition provided in *Hagans v. Lavine*, I would affirm the district court's award of attorney's fees to the Tribe.

¹⁵ *Navajo Tribal Utility* contains dictum stating that "[s]uits brought by tribal corporations have also been found to fall outside the scope of section 1362." 608 F.2d at 1231. The court cites *Cape Fox Corp. v. United States*, 456 F.Supp. 784, 798 (D. Alaska 1978), *rev'd on other grounds*, 646 F.2d 399 (9th Cir. 1981), and two other cases for that proposition. However, *Cape Fox* is inapposite. It involved "a Native corporation organized under the Alaska Native Claims Settlement Act," *id.* at 797, and thus did not even involve a tribe or band eligible to bring an action under section 1362. *See id.* at 797-98. The other cases are conclusory in their analysis, and do not provide any basis for concluding that the Tribe should not be eligible to bring a section 1362 action in this case. *See United States v. State Tax Commission*, 505 F.2d 633, 638 (5th Cir. 1974); *Dodge v. First Wisconsin Trust Co.*, 394 F.Supp. 1124, 1127, (E.D. Wis. 1975).



Appendix D

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**WHITE MOUNTAIN APACHE TRIBE, an
Indian tribe established pursuant to
Executive Order, et al.,**

Plaintiffs-Appellees,

v.

**JACK WILLIAMS, Governor of the State
of Arizona, et al.,**

Defendants,

and

**JOHN McLAUGHLIN, Chairman, Ari-
zona State Transportation Board, et
al.,**

Defendants-Appellants.

No. 81-5348
DC No. CV-73-788
PCT WEC

ORDER

Filed
April 25, 1984

**Appeal from the United States District Court
for the District of Arizona**

Honorable Walter E. Craig, U.S. District Judge, Presiding

Argued and Submitted April 6, 1982

**Before: ELY and NORRIS, Circuit Judges, and BURNS,*
District Judge.**

Appellees' petition for rehearing filed February 22, 1984 is GRANTED. The case will be reargued on June 18, 1984, at 10:00 A.M., in Courtroom #1 of the United States Court-house, 230 North First Street, Phoenix, Arizona.

Both appellants and appellees may file supplemental briefs, not to exceed twenty-five pages in length, no later than May 21, 1984. Specifically, the parties are requested to discuss *Consolidated Freightways Corp. of Delaware v. Kasel*, No. 83-1337 (8th Cir. Mar. 27, 1984).

* The Honorable James M. Burns, Chief United States District Judge for the District of Oregon, sitting by designation.

The motion of the twenty-three Indian Tribes located in the States of California and Washington for leave to file an amicus brief is GRANTED, and the Clerk is directed to file the brief accompanying the motion.

Appendix E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WHITE MOUNTAIN APACHE TRIBE, an
Indian tribe established pursuant to
Executive Order, et al.,

Plaintiffs-Appellees,

v.

JACK WILLIAMS, Governor of the State
of Arizona, et al.,

Defendants,

and

JOHN McLAUGHLIN, Chairman, Ari-
zona State Transportation Board, et
al.,

Defendants-Appellants.

No. 81-5348
D.C. No. CV-73-788

PCT WEC

OPINION

Filed
February 7, 1984

[Withdrawn
December 19, 1985]

Appeal from the United States District Court
for the District of Arizona

Honorable Walter E. Craig, U.S. District Judge, Presiding

Argued and Submitted April 6, 1982

Before: ELY, Senior Circuit Judge, NORRIS, Circuit Judge,
and BURNS,* Chief District Judge.

NORRIS, Circuit Judge:

The principal issue in this case is whether a federal dis-
trict court that has invoked the Pullman abstention
doctrine, *Railroad Commission v. Pullman Co.*, 312 U.S. 496
(1941), may later grant attorneys' fees under the Civil Rights

* Honorable James M. Burns, Chief United States District Judge for the
District of Oregon, sitting by designation.

Attorney's Fees Award Act, 42 U.S.C. § 1988 (1979),¹ after plaintiffs have submitted all their federal claims other than the request for attorney's fees to state courts. Appellants, assisted by thirty-nine states as amici curiae, argue that the federal district court could not properly entertain the request for fees once the state trial court rendered a decision on the merits of their federal claims. In addition, they argue that even if the district court properly heard the fees claim, the appellees stated no cause of action cognizable under § 1983² and that attorneys' fees under § 1988 were therefore unavailable.

I

The facts in this case are set out more fully in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). In brief, the White Mountain Apache Tribe, which inhabits a reservation in Arizona, organized a tribal enterprise to engage in the harvest of timber. In 1969 the enterprise entered into a contract with Pinetop Logging Company which provided that Pinetop would perform logging operations on the reservation. *Id.* at 139. In 1971, the Arizona Highway Department and the Arizona Highway Commission assessed a motor carrier license tax and a use fuel tax against Pinetop for activities it performed pursuant to the contract.

¹ 42 U.S. § 1988, the Civil Rights Attorney's Fees Awards Act of 1976, provides:

In any action or proceeding to enforce a provision of sections 1981, 1982 1983, 1985, and 1986 of this title, . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

² 42 U.S.C. § 1983 states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or caused to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other property proceeding for redress.

Id. at 139-40. Pinetop paid the taxes under protest, and then brought suit in state court to recover them. *Id.* at 140.

In December 1973, after the tribe had agreed to reimburse Pinetop for the assessed taxes, *id.* at 140, Pinetop and the tribe brought suit in federal court, seeking a declaratory judgment and an injunction to prevent any further imposition of state taxes against Pinetop. In both the state and federal actions, Pinetop and the tribe contend that federal law preempted the state tax laws and that the tax violated their rights to due process and equal protection.³

Shortly after commencement of the federal action, the State of Arizona filed a motion requesting the federal district court to abstain on the ground that "Arizona tax statutes here in question may be susceptible to an authoritative construction by the state courts in the pending state court action that would avoid or modify the Federal constitutional questions raised." The district court granted the motion, invoked *Pullman* abstention, and at the same time granted a consent temporary restraining order forbidding the state agencies to assess further taxes against Pinetop.

Although not required to do so, Pinetop and the tribe then elected to submit their federal claims to the Arizona courts along with the questions of state law. In May 1975, the Arizona Superior Court rejected all their claims, state and federal, and entered judgment for the state. The federal district court then dismissed the federal action sua sponte. In early 1976, however, upon the motion of Pinetop and the tribe, the district court vacated the dismissal order and entered a consent preliminary injunction pending final outcome of the state proceedings. In 1978, the Arizona Court of Appeals affirmed the state trial court judgment, characterizing the tribe's arguments as "pure sophistry." *White Mountain*

³ Although the actions were nearly identical, the federal suit, unlike the state case, covered the 1968-71 tax period. Arguing that each tax year gives rise to a separate cause of action, appellees rely on this difference between the state and federal actions to sustain federal court jurisdiction to grant equitable relief. *See infra* at n.5.

Apache Tribe v. Bracker, 120 Ariz. 282, 290, 585 P.2d 891, 899 (Ct. App. 1978), *rev'd*, 448 U.S. 136 (1980).

After the Arizona Supreme Court declined review, the state returned to federal district court with a motion to quash the consent preliminary injunction and to dismiss the federal action. The district court denied the state's motion. The United States Supreme Court then reversed the Arizona Court of Appeals, holding that the state taxes were preempted by the comprehensive federal regulatory scheme governing the harvest and sale of tribal timber. Armed with a favorable state court judgment on their federal claims, Pinetop and the tribe then returned to the district court seeking a declaratory judgment, a permanent injunction and attorney's fees. The district court granted the relief they sought, including an award of attorneys' fees of \$206,012.07. The state appeals.

II

We first address the state's contention that the district court should have declined to hear the request for attorneys' fees. The state argues that the federal action should have been dismissed after the Arizona Superior Court entered judgment in favor of the state on both state and federal claims in 1978. We disagree.

When a party presents federal claims to a federal district court for decision, the court will ordinarily hear those claims, for, with few exceptions, federal courts have an "unflagging obligation" to exercise their jurisdiction when it is invoked. *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817 (1976). "This obligation is particularly weighty when those seeking a hearing in federal court are asserting . . . their right to relief under 42 U.S.C. § 1983." *Tovar v. Billmeyer*, 609 F.2d 1291, 1293 (9th Cir. 1980) (quoted in *Miofsky v. Superior Court*, 703 F.2d 332, 338 (9th Cir. 1983)). As the Supreme Court has explained, "[t]he very purpose of § 1983 was to interpose the federal courts between the state and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law . . ." *Mitchum v.*

Foster, 407 U.S. 225, 242 (1971). Notwithstanding these basic principles of federal jurisdiction, the district court in the present case deferred the exercise of its jurisdiction pending state court determination of issues of state law by invoking the so-called *Pullman* abstention doctrine. See *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941).

Pinetop and the tribe were not required by the district court's abstention order to submit their federal claims for decision by the state courts. In *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 421 (1963), the Court held that a federal plaintiff required by a district court's invocation of *Pullman* abstention to detour to state court on his state claims may reserve his federal claims and litigate them in federal court after conclusion of the state proceedings.⁴ *England* thus carved out an exception to the normal rules of claim preclusion which would have compelled Pinetop and the tribe to raise their federal claims in state court because they clearly "could have been raised" in that forum. See *Kremer v. Chemical Construction Corporation*, 102 S.Ct. 1883, 1889 n.6 (1982) ("Under *res judicata*, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.").

England makes clear, however, that federal claims which are voluntarily submitted to the state courts along with state claims may not be relitigated later in federal court. 375 U.S. at 419. The state argues here that because Pinetop and the tribe chose to submit their federal claims in the state courts for decision, they are also barred from returning to federal district court to seek attorneys' fees even though they did not submit their claim for fees to the state courts. In support

⁴ In contrast to *Pullman* abstention, the abstention doctrines derived from *Barford v. Sun Oil Co.*, 319 U.S. 315 (1943), and *Younger v. Harris*, 401 U.S. 37 (1971), contemplate non-exercise of jurisdiction and dismissal of the action. See *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 415 & n.5 (1964).

of its position, the state relies on the Supreme Court's statement in *England* that,

[i]f a party freely and without reservation submits his federal claims for decision by the state courts, litigates them there, and has them decided there, then—whether or not he seeks direct review of the state decision in this Court—he has elected to forgo his right to return to the District Court.

Id. We do not read *England*, however, as foreclosing the question whether a federal plaintiff who has submitted some but not all federal claims to the state courts may return to federal court for adjudication of those claims he has reserved. *England* holds only that one who “abandon[s] his original choice of a federal forum and submit[s] his *entire* case to the state court,” *id.* at 418 (emphasis added), must abide by that decision.⁵

The attorneys’ fees issue now confronting us is much narrower than that before the Supreme Court in *England*. We need only determine whether the readily severable claim for attorneys’ fees may be reserved and whether a reservation of

⁵ The state argues that *England* is a jurisdictional bar—that the federal court lost subject matter jurisdiction to hear the claim for attorneys’ fees when the state court ruled on the merits of the federal claims. See Appellant’s Opening Brief at 9. Elsewhere, however, the state seems to concede that *England* speaks to principles of res judicata rather than to jurisdiction and apparently recognizes that the distinction between a jurisdictional bar and one based on res judicata makes little practical difference. See *id.* at 7.

We do not believe, however, that *England* erects a jurisdictional bar. As appellants concede, in other types of actions over which federal and state courts have concurrent jurisdiction, each court may exercise its jurisdiction, with the judgment first in time res judicata in the other forum. See *Miller v. Miller*, 423 F.2d 145 (10th Cir. 1970) (diversity jurisdiction). We see no reason for a different rule in this case, for we believe that the thrust of *England* lies in its implicit recognition that a federal court judgment must not conflict with a previously entered state court judgment.

that claim must be explicit.⁶ The question whether a federal plaintiff subjected to a *Pullman* abstention order may reserve only his attorneys' fees claim for later decision by the abstaining federal court appears to be one of first-impression. In deciding it, we must bear in mind the central concern that animated *England's* modification of the usual rules of res judicata: the right of a § 1983 plaintiff to choose a federal forum. *Id.* at 415.

In the present case, Pinetop and the tribe were turned away from their chosen forum when the federal district court invoked *Pullman* abstention. They had no choice but to litigate in the Arizona state courts their challenge to the imposition of the tax on state law grounds. Probably for understandable reasons of economy, they chose to litigate in the state courts their federal claims as well. They were totally unsuccessful in the state courts and obtained a favorable state court judgment only because the United States Supreme Court reversed the Arizona Court of Appeals on the ground that federal law prohibited Arizona from imposing the tax. In these circumstances, we find the predicament of Pinetop and the tribe to be peculiarly sympathetic. By submitting their federal claims on the merits, they voluntarily elected to take their chances in state court. But they did not submit their request for attorneys' fees to the state court, and we see no purpose to be served under the principles of *Pullman* and *England* in compelling them to do so. Indeed, to require them to submit their claim for attorneys' fees to the state courts that rejected all their claims, both state and federal, would do unnecessary violence to the principle that civil rights plaintiffs have a right to choose a federal forum for the vindication of their federal claims.

⁶ Appellants argue that because § 1988 was not passed by Congress until 1976, Pinetop and the tribe could not have elected in 1974 to refrain from pressing their § 1988 federal attorneys' fees claim in state court. Appellants' Reply Brief at 3-4. The fact remains, however, that neither during 1976 nor at any time thereafter did appellees submit their attorneys' fees claim to the state courts.

Neither *Pullman* nor *England* dictates such a result. The justifications for *Pullman* abstention—to permit state court interpretation of state laws and to avoid premature adjudication of federal constitutional claims—are irrelevant to the question whether a federal plaintiff may return to federal court for attorneys' fees after obtaining a favorable judgment in the state court action. We conclude, therefore, that Pinetop and the tribe could properly reserve their claim for fees while submitting their other federal claims on the merits.⁷

Our decision is a narrow one. We hold only that a federal civil rights plaintiff with a *Pullman* abstention order may reserve his attorneys' fees claim for decision by the federal district court if he ultimately prevails on his federal claims in the United States Supreme Court after they have been rejected by the state courts. This holding is a warranted extension of our holding in *Bartholomew v. Watson*, 665 F.2d 910, 912-914 (9th Cir. 1982). There the federal district court stayed proceedings on a § 1983 civil rights claim pending state court resolution of state law issues. The plaintiffs elected not to submit any of their federal claims to the state court for decision. We held that the abstaining district court may award attorneys' fees under § 1988 for services performed in litigating state claims in state courts. We commented that far from promoting judicial economy, the adoption of a contrary rule would lead to "serious strains between the state and federal court systems," and would hinder efforts to vindicate rights enforceable under § 1983. *Id.* at 913. *Cf. New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 71 (1980) (706 (k) of Title VII authorizes the federal district

⁷ We realize that Pinetop and the tribe did not inform the state court of their intention to reserve the attorneys' fees issue. But as the Supreme Court noted in *England*, "an explicit reservation is not indispensable." 375 U.S. at 421. In our view, the purpose of an explicit reservation is simply to clarify whether a party has voluntarily submitted federal claims to state courts or whether he is merely "exposing" his claims there so that state law may be construed in light of federal claims. *See id.* at 420-21. When a claim for attorneys' fees is not submitted, we see no need for an express reservation.

court to award attorneys' fees for related state proceedings). Here we hold that the abstaining district court, under the circumstances presented by this case, may award attorneys' fees under § 1988 for services performed in litigating both state and federal claims in the state courts.

We note finally that although considerations of judicial economy may weigh against allowing Pinetop and the tribe to return to federal court solely on their claim for fees, those considerations are not significant when weighed against the overriding Congressional policy of affording a § 1983 plaintiff access to a federal forum. Generally it will not be grossly inefficient for the abstaining district court judge to decide a discrete claim for fees. Here, in particular, Judge Craig was well-positioned to hear the attorneys' fees request. As Pinetop and the tribe observe:

Of the four components of services—those in federal district court, those in the state superior court, those in the state appellate courts, and those in the U.S. Supreme Court—a state judge could only have familiarity with those in state court. But in fact, due to recent rotation of the state case to the docket of a new judge, a fees request in state court would have been decided by a judge with no prior knowledge of any aspect of this case. Judge Craig, on the other hand, had intimate familiarity with the services expended in his own court and has closely monitored this litigation since 1973, even as to aspects performed in other courts.

Appellees' Answering Brief at 36.

III

Having decided that *England* does not bar the federal district court from hearing the attorneys' fees claim, we turn to the question whether Pinetop and the tribe have stated a cause of action under § 1983 for which attorneys' fees are available under § 1988. Pinetop and the tribe argue that in preempting the state's power to tax the tribe's timber, Congress intended to create in the tribe "a right secured by the laws of the United States within the meaning of section

1983." *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 28 (1981). As noted, the Supreme Court did hold in *White Mountain Apache Tribe, supra*, that the federal law regulating the harvest and sale of tribal timber preempted the Arizona tax statutes, reasoning that

Where ... the Federal Government has undertaken comprehensive regulation of the harvesting and sale of tribal timber, where a number of the policies underlying the federal regulatory scheme are threatened by the taxes respondents seek to impose, and where respondents are unable to justify the taxes except in terms of a generalized interest in raising revenue, we believe that the proposed exercise of state authority is impermissible.

White Mountain Apache Tribe, 448 U.S. 136, 151 (1980). Although the Court acknowledged that "traditional notions of Indian self-government ... provided an important 'back-drop'" for its analysis, 448 U.S. at 143, it explicitly "based [its decision] on the preemptive effect of the comprehensive federal regulatory scheme" governing the timber harvest. *Id.* at 151 n. 15. The question whether Congress intended to preempt Arizona tax law—the question which was decided in *White Mountain Apache Tribe*—is, of course, different from the question whether in exercising its preemptive powers under the Supremacy Clause (U.S. Const. art. VI, cl. 2), Congress intended to create a right enforceable by the tribe in an action under section 1983. Based upon the following analysis, we think that question must be answered in the negative.

A

The starting point for our analysis of the question whether appellees have stated a claim cognizable under § 1983 is recent Supreme Court and Ninth Circuit case law delineating the scope of § 1983 protection. In *Maine v. Thiboutot*, 448 U.S. 1 (1980), the Court confronted the question whether social security beneficiaries could maintain a § 1983 cause of action grounded on state violations of the Social

Security Act.⁸ The Court concluded that "the § 1983 remedy broadly encompasses violations of federal statutory as well as constitutional law," and permitted the plaintiffs to recover. *Id.* at 4.

The *Thiboutot* language was interpreted broadly by some courts to mean that the terms of § 1983 were so general as to encompass all statutory programs in which there was some federal participation. See, e.g., *Yapalater v. Bates*, 494 F. Supp. 1349, 1358 (S.D.N.Y. 1980), *aff'd*, 644 F.2d 131 (2d Cir. 1981) (§ 1983 remedy available to physician claiming that state Medicaid program's failure to reimburse him for

⁸ Pinetop and the tribe contend that their preemption claim states a cause of action under § 1983, but that in any case, that claim was pendent to substantial constitutional claims which would support a fees award under *Maher v. Gagne*, 448 U.S. 122 (1980). Their complaint alleged that the state's attempt to impose the taxes denied Pinetop and the tribe their fourteenth amendment rights to due process and equal protection. We are not persuaded, however, that those allegations are "sufficiently substantial to support federal jurisdiction . . ." *Id.* at 127. Pinetop and the tribe offer no analysis in support of their contention that the constitutional claims were nonfrivolous. They cite no authority other than an isolated statement from Justice Stevens's dissent in *White Mountain Apache Tribe*, 448 U.S. at 157, noting that Arizona's lawyers had conceded in oral argument that the state had no interest in the roads used by Pinetop. If this were true, Justice Stevens stated, "Pinetop may well have a right to be free from taxation as a matter of due process and equal protection." *Id.* at 158 (footnote omitted). He explained:

The Due Process Clause may prohibit a State from imposing a tax on the use of completely private roads if the tax is designed to reimburse it for use of state-owned roads. Or it may be that once the State has decided to exempt private roads from its taxing system, it is also required, as a matter of equal protection, to exempt other types of roads that are identical to private roads in all relevant aspects.

Id. at 158 n.7.

We do not read Justice Stevens remarks as expressing his opinion that there was substance to Pinetop and the tribe's constitutional claims. We conclude therefore that appellees' constitutional claims are insubstantial and that they will not support an award of attorneys' fees under § 1988.

services rendered by his ancillary personnel was inconsistent with federal regulations under Social Security Act). These courts drew support for their interpretation from Justice Powell's dissenting statement in *Thiboutot* that,

[i]n practical effect, today's decision means that state and local governments, officers and employees may now face liability whenever a person believes he has been injured by the administration of *any* federal - state cooperative program, whether or not that program is related to equal or civil rights.

448 U.S. at 22.

Contrary to Justice Powell's prediction, however, the seemingly broad reach of *Thiboutot* was soon restricted. Observing that not every violation of a federal law gives rise to a § 1983 cause of action, the Court in *Pennhurst State School and Hospital*, 451 U.S. 1, 28 (1981), explained that § 1983 provides a remedy only for deprivations of "rights secured" by the laws of the United States. Stressing the importance of a finding of Congressional intent to create enforceable rights and obligations, 451 U.S. at 15, the Court held that a simple allegation of injury resulting from the joint operation of a federal-state program was insufficient to give rise to a § 1983 cause of action.

In *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1 (1981), the Court further circumscribed the apparent breadth of *Thiboutot* when it identified two situations where § 1983 is not available to remedy violations of federal statutory law: first, if the statute at issue does not create "enforceable rights," *id.* at 19; and second, if the statute provides an exclusive remedy, *id.* at 21. The second test clearly does not apply to the timber statutes at issue here. We are concerned with the first question: whether Congress has created enforceable rights in the tribe under § 1983 by enacting the legislation regulating the harvest and sale of the tribe's timber.

Although the Supreme Court has not had occasion to develop further the concept of "enforceable rights" in the

context of § 1983, our court held in *Boatowners and Tenants Association v. Port of Seattle*, 716 F.2d 669 (9th Cir. 1983), that the “enforceable rights” required to maintain a cause of action under § 1983 arise only if Congress intended the statute to create rights for the special benefit of the class to which plaintiffs belong. *Id.* at 673. In *Boatowners*, an association of pleasure craft owners charged that the manner of operation of a municipal marina violated the River and Harbor Improvements Act, 33 U.S.C. §§ 540-633 (1976), and constituted a deprivation of federal statutory rights cognizable under § 1983. Emphasizing congressional intent, we found in *Boatowners* that the purpose of the River and Harbor Improvements Act was to regulate the field of “water terminals . . . at all cities and towns located upon harbors or navigable waterways” for the benefit of the general public. *Id.* (citing 33 U.S.C. § 551 (1976)). We stated that “there is no indication that the statute was intended to benefit specially the pleasure craft owners . . . nor that Congress intended to confer federal rights on [them].” *Id.* at _____ (footnote omitted). The legislative history similarly indicated that the intent was to improve navigation, control traffic, and enhance commerce generally. *Id.* Thus, we held that the pleasure craft owners had no “enforceable rights” as required by *Pennhurst* and *Middlesex County* to maintain a § 1983 action.

B

Boatowners thus makes the availability of a § 1983 cause of action for state violations of federal statutory law depend upon congressional intent in passing the statute at issue. Our task here, of course, is to apply the analytical framework developed in *Boatowners* to the theories advanced by appellees in contending that the tribe has a cause of action under § 1983.

Both the state and the amici curiae argue that the timber statutes are merely regulatory in nature and contend that a comprehensive federal regulatory scheme does not create § 1983 rights simply because it preempts state law. They rely heavily on *First National Bank of Omaha v. Marquette*

National Bank of Minneapolis, 636 F.2d 195 (8th Cir. 1980), cert. denied, 450 U.S. 1042 (1981), in which the court held that no cause of action existed under § 1983 where a state law conflicted with the National Bank Act, 12 U.S.C. § 85 (1976). The State argues that *First National Bank of Omaha* supports its contention that "federal laws preempting state regulations or taxation in the commercial context do not give rise to 'rights, privileges or immunities' cognizable under 42 U.S.C. § 1983." Appellants' Opening Brief at 15. The amici cite the same case for their claim that the dispute between the federal and state governments as to who may regulate the Indian timber harvest "does not give rise to any 'rights' on the part" of the tribe. Brief of Amici Curiae at 6.

The appellees respond that *First National Bank of Omaha* is clearly distinguishable from the instant case, pointing out that the Eighth Circuit limited its remarks to "conflicts with the National Banking Act ... affecting only commercial institutions." They note that even if *First National Bank of Omaha* accurately stated the law on its own facts, the parties here are not "commercial institutions" alone, but include the Indian people, their agents and state officials. The appellees also correctly label the passages cited by appellants as dicta which do not support the broad proposition that federal statutes forbidding state regulation or taxation in the commercial context never give rise to § 1983 rights.

We agree with the State and the amici that a federal regulatory statute that preempts state law does not automatically give rise to a cause of action under § 1983. We do not believe that the exercise of Congress's power to preempt state law necessarily manifests a congressional intention to create rights enforceable under § 1983. The Supremacy Clause "is not a source of any federal rights;" it simply secures existing federal rights "by according them priority whenever they come in conflict with state law." *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 613 (1978). To hold that a § 1983 cause of action exists, we must look for evidence of congressional intent to create rights enforceable under § 1983 rather than merely for evidence of congress-

sional intent to preempt state law. If, as in *Boatowners*, the federal statutes in question are designed only to regulate a field for the benefit of the general public rather than to confer "especial benefits" on a designated class of persons, the requisite congressional intent to create an enforceable right under § 1983 could not be found. The National Bank Act at issue in *First National Bank of Omaha* is such a regulatory statute. In other words, we cannot hold that Arizona tax laws violate the Civil Rights Act solely for the reason that they conflict with federal laws regulating the tribe's harvest and sale of reservation timber.

We agree with the tribe, on the other hand, that just because federal law preempts state taxation does not mean that such a law does not create enforceable rights under § 1983. As we emphasized in *Boatowners*, the determination whether or not a federal statute confers rights cognizable under § 1983 is essentially a question of congressional intent. The tribe urges that the timber statutes "deal with personal, human rights," not merely with commercial regulatory interests. Relying on the Supreme Court's preemption analysis in *White Mountain Apache Tribe*, the tribe contends that Congress intended in passing these statutes to promote Indian self-government, tribal economic activities, and reservation environmental, esthetic, ecological and safety goals. Appellees' Answering Brief at 49. We agree in part with the tribe's analysis. The Court in *White Mountain Apache Tribe* found that Congress intended preemptive effect to be accorded federal law where such state laws endangered the "firm federal policy of promoting tribal self-sufficiency and economic development." 448 U.S. at 143. Emphasizing that over 90% of the revenue funding the tribe's governmental programs is derived from the timber harvest, 448 U.S. at 138, the Court found that state taxation of activities related to that harvest would "undermine" the federal policy of promoting tribal self-government and was therefore preempted.

448 U.S. at 148.

The interests cited by the tribe and the interests identified by the Supreme Court in *White Mountain Apache Tribe*,

however, are interests of the Indian people in their capacity as a sovereign tribe. We are thus not talking about a congressional intent to create individual rights. Nor could it be said that these federal laws create in the tribe as a whole any new interest in the timber; rather they regulate a pre-existing interest of the tribe. As the Court stated in *White Mountain Apache Tribe*, "[u]nder federal law, timber on reservation land is owned by the United States for the benefit of the Tribe ..." 448 U.S. at 138. The tribe's exclusive right to the beneficial use of the timber therefore existed prior to the formulation of this regulatory scheme.⁹ The central thrust of the statutes is merely to grant the Secretary of the Interior authority to regulate the harvest and sale of the tribe's own timber. 25 U.S.C. § 406-407 (1976). In exercising that authority, the Secretary is required, of course, to base his decisions "upon a considerations of the needs and best interests of the Indian owner and his heirs." 25 U.S.C. § 406(a) (1976). This requirement arises from the federal government's pre-existing obligations as owner of the timber for the beneficial use of the tribe. The kind of general regulatory provisions involved in the instant case are analogous, in fact, to that involved in *Boatowners*. There it was the regulation of municipal marinas; here is the regulation of the harvest of timber on reservation land. Thus, we cannot find that Congress by these statutes intended to create new rights unless the federal policy of promoting Indian self-government can be construed as an intention to confer "rights." The question we must decide, therefore, is whether

⁹ The tribe's ownership interests in the timber are recognized explicitly in the timber regulations themselves. As the Supreme Court noted in *White Mountain Apache Tribe*, 448 U.S. at 147,

Among the stated objectives of the regulations is the 'development of Indian forests by the Indian people for the purpose of promoting self-sustaining communities, to the end that the Indians may receive from *their own property* not only the stumpage value, but also the benefit of whatever profit it is capable of yielding, and whatever labor the Indians are qualified to perform.' 25 C.F.R. 141.3(a) (3) (1979). [Emphasis added]

Congress by promoting tribal self-government intended to give rise to rights cognizable under § 1983.

In exercising its powers under the Supremacy Clause, as the Supreme Court held in *White Mountain Apache Tribe*, Congress intended to deny Arizona the power to tax any of the revenues generated by activities related to the harvest and sale of the timber. 448 U.S. at 148. Put another way, Congress has determined that the portion of the revenues from this economic activity that would normally be available to help fund public services provided by the state, such as roads and schools, would be available exclusively to a different sovereign, the tribe. Thus, Congress has effectively allocated the power to tax the timber activities among different sovereigns. Specifically, it has decided to deny one sovereign—the State—any power to tax this particular economic activity. We do not believe that such an exercise of Congress's power under the Supremacy Clause manifests an intention by Congress to create new "enforceable rights" cognizable under § 1983. As the court said in *Consolidated Freightways Corporation v. Kassel*, 556 F. Supp. 740, 748 (S.D. Iowa 1983), "Section 1983 is concerned with the relationship between individuals and the states in matters involving life, liberty or property, and was not intended to apply to the distribution of powers between the general and state governments under our federal system." We see no reason why this principle should not apply with equal force to the distribution of powers between a state and an Indian tribe.

Nor do we find an enforceable right cognizable under § 1983 in "the right of reservation Indians to make their own laws and be ruled by them." *White Mountain Apache Tribe*, 448 U.S. at 142. Although preemption provides the primary basis for the holding in *White Mountain Apache Tribe*, the Court also observed that "traditional notions of Indian self-government . . . provided an important 'back-drop,'" *id.* at 143 (quoting *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 (1973)), coloring the preemption inquiry. The possible infringement of the right

to tribal self-government does not alter our analysis, however. Such a right cannot be traced to any particular provision of the Constitution. In fact, the right of Indians to be ruled by tribal law is extraconstitutional, for Indian sovereignty antedates the Constitution. The Constitution delegates power to make treaties recognizing rights that derive from sovereignty, see U.S. Const. art. II, § 2, cl. 2, but it does not itself create rights to the timber in the sovereign tribes or their members.

Finally, statutes recognizing the right to tribal self-government represent, of course, an entitlement to special treatment, a right to be governed outside our laws, state or federal. At the heart of § 1983 is the right to equal, rather than special treatment. It strikes us that it would be paradoxical to conclude that a § 1983 cause of action is available to enforce the right to be treated differently from others by virtue of a right to self-government.

We therefore hold that neither the federal regulatory scheme nor the right to tribal self-government creates a right enforceable under § 1983. In order to give rise to a § 1983 cause of action, a federal law must confer an enforceable right beyond its ability to trump conflicting state law. Thus we conclude that appellees are not entitled to attorneys' fees under § 1988.¹⁰

IV

The state also appeals from the district court order granting a declaratory judgment and a permanent injunction. Appellees contend that the injunction and declaratory judgment were appropriate because the district court's findings reflected a sufficient threat that the state would impose the impermissible taxes even after the Supreme Court barred it from doing so in *White Mountain Apache Tribe*.

¹⁰ The state argues that the tribe is not a "citizen" or a "person" within the meaning of § 1983. Appellants' Reply Brief at 17. Because we hold that the tribe has not stated a claim cognizable under § 1983, we need not reach this issue.

In the absence of a controversy "of sufficient immediacy and reality," *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941), a district court lacks jurisdiction to issue a declaratory judgment. *Sellers v. Regents of the University of California*, 432 F.2d 493, 499-500 (9th Cir. 1970). Here, there is no evidence that state officials intend to ignore the Supreme Court's decision in *White Mountain Apache Tribe*. The record in fact contains evidence to the contrary. After the Supreme Court's decision, the state filed an affidavit stating that it did not intend to impose any of the disputed taxes on Pinetop and the tribe. We cannot presume from this record that the state officials will not honor a final state court judgment based upon a decision of the United States Supreme Court. We therefore hold that the district court erred in concluding that a controversy "of sufficient immediacy and reality" supported the issuance of a declaratory judgment against assessment of the taxes for the years covered by the Supreme Court's decision.

Appellees further contend, however, that the district court properly entered a declaratory judgment on the merits covering the 1968-71 tax period, since assessments covering that period were never adjudicated by either the state courts or the Supreme Court. The state court tax refund action that ultimately reached the Supreme Court dealt only with taxes paid under protest after November 1971, and Pinetop and the tribe argue that "each year is the origin of a new [tax] liability and a separate cause of action," *Commissioner v. Sunnen*, 333 U.S. 591, 598 (1948). They nevertheless concede that any attempt by the state to impose taxes covering the 1968-71 period would be thwarted by the doctrine of collateral estoppel. Appellees' Answering Brief at 27. See *Montana v. United States*, 440 U.S. 147 (1979). We thus see no justification for injunctive relief covering the 1968-71 period.

REVERSED.

WHITE MOUNTAIN APACHE TRIBE V.

McLAUGHLIN, No. 81-5348

ELY, CIRCUIT JUDGE, DISSENTING IN PART:

I respectfully dissent from the portion of the majority's opinion that holds that Pinetop and the tribe have failed to state a claim cognizable under § 1983 for which attorneys' fees are available under § 1988.

The majority reaches its holding on this issue by first concluding that the federal statutes and regulations which together form the comprehensive program regulating the harvest of Indian timber do not confer the "enforceable rights" specified in *Boatowners and Tenants Association v. Port of Seattle*, 716 F.2d 669 (9th Cir. 1983). With that conclusion, I simply do not agree. Applying the analytical framework developed in *Boatowners* to the theories advanced by Pinetop and the tribe leads me to the ineluctable conclusion that they have a claim which is fully cognizable under § 1983.

In *Boatowners*, our Court held that the "enforceable rights" required to maintain a claim under § 1983 arise only if the statute confers rights for the special benefit of the class to which plaintiffs belong. *Id.* at 672-74. Emphasizing congressional intent, *Boatowners* concluded that the purpose of the River and Harbor Improvements Act was to benefit the general public by regulating the field of "water terminals . . . at all cities and towns located upon harbors or navigable waterways." *Id.* at 673 (citing 33 U.S.C. § 551 (1976)). Our Court stated that "there is no indication that the statute was intended to benefit specially the pleasure craft owners . . . nor that Congress intended to confer federal rights on [them]." *Id.* at 673-74 (footnote omitted). Thus, we held that the pleasure craft owners did not have the requisite "enforceable rights" to maintain a § 1983 action.

The negative implication of *Boatowners* is, of course, that had we found that Congress intended to benefit specially the pleasure craft owners and to confer federal rights unto them,

we would be free to conclude that they possessed the "enforceable rights" necessary to maintain a § 1983 action.¹

In the case at hand, the required emphasis on congressional intent reflects a congressional intention to benefit specially Indian tribal timberland owners and to confer federal rights unto them. I reach this conclusion for the following reasons:

First, one of the pertinent statutes explicitly provides that the Secretary of the Interior, in making his decisions regarding Indian timber, must consider "the needs and best interests of the Indian owner and his heirs":

Sales of timber under this subsection shall be based upon a consideration of the needs and best interests of the Indian owner and his heirs. The Secretary shall take into consideration, among other things, (1) the state of growth of the timber and the need for maintaining the productive capacity of the land for the benefit of the owner and his heirs, and (2) the highest and

¹ In *Boatowners*, our Court held that "at least the existence of a federal right found under the analysis of the first factor in *Cort*, ... [i.e., whether the plaintiff is a member of the class for whose benefit the statute was enacted and whether Congress intended to confer federal rights upon those beneficiaries] is required in order to support a section 1983 action." *Boatowners*, 716 F.2d at 673 (emphasis supplied). Since we concluded that the River and Harbor Improvements Act did not create any federal rights in the plaintiffs whatsoever, *id.*, we left open the question of whether a plaintiff who possessed "*Cort* first-factor" rights could be barred from enforcing those rights under § 1983. We left open the same question in *Meyerson v. Arizona*, 709 F.2d 1235, 1239 (9th Cir. 1983), even though we previously had found, in *Fischer v. City of Tucson*, 663 F.2d 861, 863-64 (9th Cir. 1981), that the statute in question had conferred federal rights upon the protected class, of which the plaintiffs in both *Meyerson* and *Fischer* were members. Accordingly, the current state of the law is that a plaintiff who possesses "*Cort* first-factor" rights, as elaborated in *Boatowners*, is not precluded from protecting those rights under § 1983, unless, of course, the § 1983 action is barred by the other exception identified in *Pennhurst* and *Middlesex*: that Congress intended to provide an exclusive remedy within the statute and to foreclose private enforcement through other means. See, e.g., *Boatowners*, 716 F.2d at 673. In this case, we are not faced with the question of whether an "exclusive remedy" exists within the statute.

best use of the land, including the advisability and practicality of devoting it to other uses *for the benefit of the owner and his heirs*, and (3) *the present and future financial needs of the owner and his heirs*.

25 U.S.C. § 406(a) (1976) (emphasis supplied).

Second, the pertinent House Report states that one of the goals of the statutory scheme is to "provide[] that the revenues derived from timber sales shall be used *for the benefit of tribal members . . .*" H.R. Rep. No. 1292, 88th Cong., 2d Sess. 2, *reprinted in* 1964 U.S. Code Cong. & Ad. News 2162, 2162-63 (emphasis supplied).

Third, in interpreting the same statutory scheme that is here involved, the Supreme Court has unequivocally stated, "The action of Congress in authorizing the sale of the timber, and the contracts prescribed under its authority by departmental regulations and approved by the Secretary, are to be viewed as *the means chosen for the exercise of the power of the [federal] government to protect the rights and beneficial ownership of the Indians.*" *United States v. Algoma Lumber Co.*, 305 U.S. 410, 421 (1938) (emphasis supplied).

Fourth, in an earlier phase of the case we are now considering, the Supreme Court stated:

Underlying the federal regulatory program rests a policy of assuring that the profits derived from timber sales will inure *to the benefit of the Tribe*, subject only to administrative expenses incurred by the Federal Government. . . . [T]he Federal Government has undertaken to regulate the most minute details of timber production and [has] expressed a firm desire that the Tribe should retain the benefits derived from the harvesting and sale of reservation timber.

White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 149 (1979) (emphasis supplied).

Under the above cumulation of legislative history, Supreme Court interpretation, and the language of the statute itself, the Congress, by enacting the statutes at issue, fully intended to confer "special benefits" on the class to

which plaintiffs belong. See *Limongelli v. Postmaster General*, 707 F.2d 368, 371 (9th Cir. 1983) (per curiam) ("special benefit" test is satisfied when the statute places "unmistakable focus on the benefited class" (quoting *Canon v. University of Chicago*, 441 U.S. 677, 691 (1979))). One of those "special benefits" is the right to be free from state taxation on any of the revenues generated by activities related to the harvest and sale of their timber. See *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 148-53 (1980). In essence, the majority asserts that the plaintiffs' "right" to be free from state taxation on the revenues generated by activities related to the harvest and sale of reservation timber, while secured by federal statute and intended to specially benefit Indian tribal timberland owners, is not a "federal enforceable right" at all. I respectfully submit that the majority's assertion in that respect is logically fallacious.

As the law now stands, the plaintiffs possess the requisite "enforceable rights" to state a claim cognizable under § 1983,² and, accordingly, the District Court did not "abuse"

² By interpreting the statutory scheme in this case to imply that the plaintiffs do not have the requisite "enforceable rights" to state a claim cognizable under § 1983, the majority has run afoul of a basic tenet of federal Indian law: that ambiguous statutes passed for the benefit of Indian tribes are to be interpreted in a light most favorable to Indians. *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976) (quoting *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1918)). Thus, even if the statute or the congressional intent were ambiguous, which I think they are not, the scales still must tip in favor of the plaintiffs.

The Eighth Circuit has reached a similar conclusion. In *Chase v. McMasters*, 573 F.2d 1011 (8th Cir.), cert. denied, 439 U.S. 965 (1978), the court held that a plaintiff that alleged a violation of § 5 of the Indian Reorganization Act, 25 U.S.C. § 465 (1970), had stated a cause of action under § 1983. The Indian Reorganization Act of 1934, also known as the Wheeler-Howard Act, 25 U.S.C. §§ 461-495 (1976 & Supp. V 1981), authorizes the Secretary of the Interior to acquire land for Indians. Under 25 U.S.C. § 465, title to such lands is taken by the United States in trust for the Indian or Indian tribe, and the land is exempt from state and local taxation.

The similarity between the Indian Reorganization Act and the statutory scheme here involved is readily apparent. Both were intended to benefit specially Indians by encouraging tribes to revitalize their self-government and to assume control over their business and economic affairs. Compare *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973) ("The intent and purpose of the Reorganization Act was to 'rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.'" (citing H.R. Rep. No. 1804, 73d Cong., 2d Sess. 6 (1934))) with *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 147 (1979) ("Among the stated objectives of the [tribal timber] regulations is the 'development of Indian forests by the Indian people for the purpose of promoting self-sustaining communities, ...'" (citing 25 C.F.R. § 141.3(a)(3) (1979))). Both provide that the Federal Government hold the respective natural resource in trust for the Indian or Indian tribe. See *United States v. Algoma Lumber Co.*, 305 U.S. 415, 420 (1939) ("Under ... established principles applicable to land reservations created for the benefit of the Indian tribes, the Indians are the beneficial owners of the land and the timber standing upon it and of the proceeds of their sale, subject to the plenary power of control by the United States, to be exercised for the benefit and protection of the Indians."). And both, in some way, preclude the state or local taxation of the natural resource. Compare 25 U.S.C. § 465 (1976) ("such lands ... shall be exempt from State and local taxation") with *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 141-53 (1979) (under federal law, taxes could not lawfully be imposed on logging activities conducted exclusively within the reservation or on hauling activities on Bureau of Indian Affairs and tribal roads).

In *Chase*, the plaintiff, an enrolled member of an Indian tribe, alleged that the refusal of a town's leaders to allow her to connect her home to city sewer and water lines deprived her of a statutory right to the beneficial use of property exempt from taxation under § 465. The town had not attempted to tax the land; it simply refused to connect the land to city sewer and water lines as long as it was held by the United States in trust and was exempt from local property taxes. The court concluded that the town's action was "precluded by the Supremacy Clause because it impaired [the plaintiff's] right under § 465 to enjoy the beneficial use of land held in trust for her without the obligation to pay local taxes and thereby interfered with the operation of an important means of implementing a policy adopted by the federal government to meet its trust obligations to Indian tribes." *Id.* at 1018. The similarity between the Eighth Circuit's reasoning in *Chase* and the Supreme Court's reasoning in *White Mountain Apache* is evident.

its discretion in awarding attorneys' fees to the plaintiffs under § 1988.³

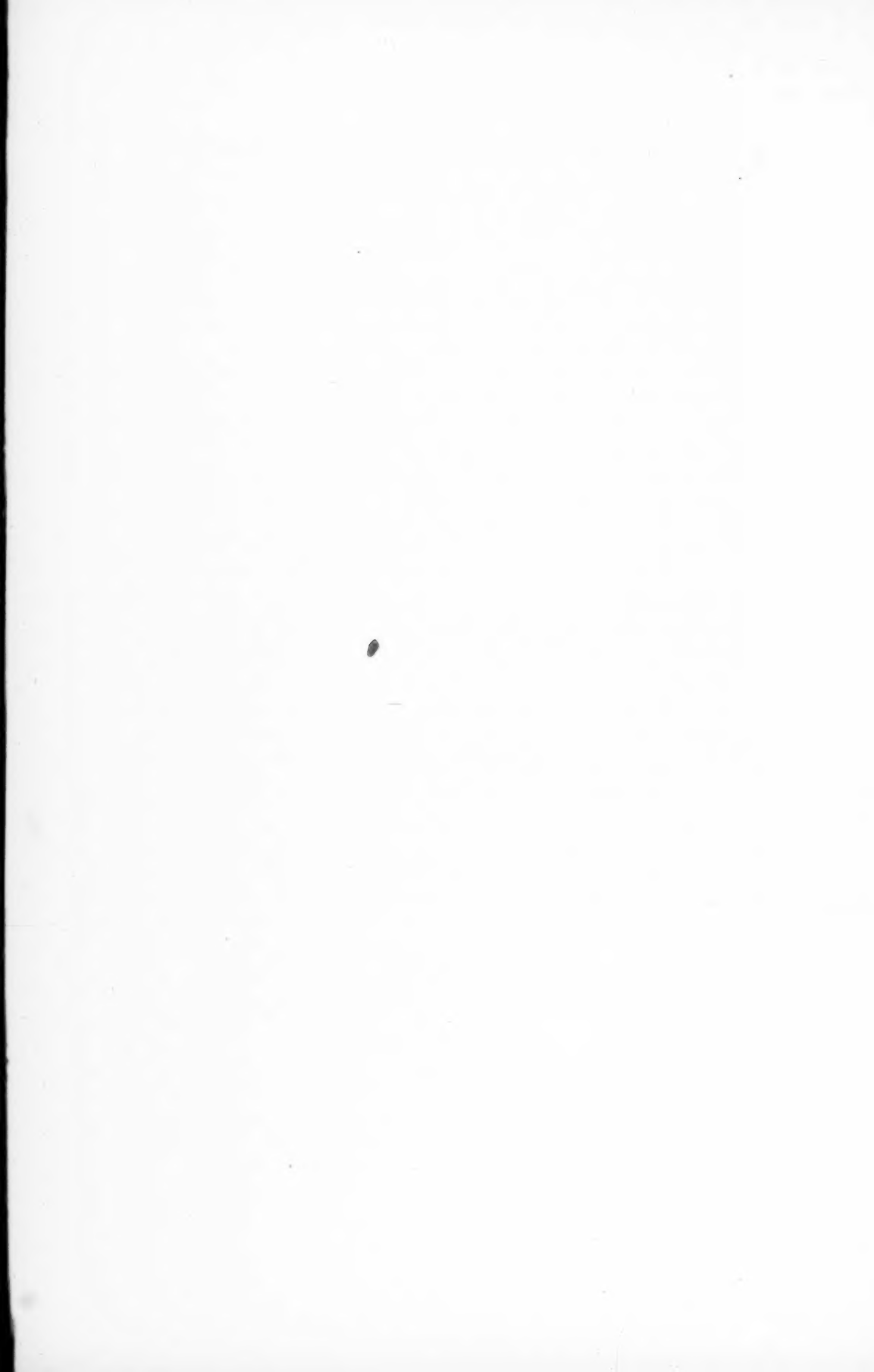
More important to the case at hand, the *Chase* court also held "that [the plaintiff's] claim that she was denied rights under 25 U.S.C. § 465 state[d] a claim under 42 U.S.C. § 1983." *Id.* at 1017. The court aptly reasoned:

While . . . a § 1983 action does not exist for every violation of a federal statute, we think it clear that the violation here, based as it is upon the "unique legal relationship between the Federal Government and tribal Indians," *Morton v. Mancari*, 417 U.S. 535, 550, 94 S. Ct. 2474, 2482-83, 41 L.Ed.2d 290 (1974), does state a cause of action under § 1983. Here a federal right was conferred upon a tribal Indian and the challenged local action allegedly interfered with that right and, therefore, with the relationship between the federal government and a tribal Indian.

Id. (footnote omitted).

While the claims of the respective plaintiffs in *Chase* and the case at hand are not identical, the *Chase* court's rationale for finding the existence of a § 1983 claim is applicable to the case at hand. In both cases, a federal statutory scheme confers upon Indians the right to the beneficial use, without the burden of state taxation, of the certain natural resources. Those rights are fully cognizable under § 1983.

³ "Abuse of discretion" is the appropriate standard of review. See *Boatowners*, 716 F.2d at 674 (citing *Hensley v. Eckerhart*, _____ U.S. _____ 103 S. Ct. 1933 (1983)).



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

WHITE MOUNTAIN APACHE TRIBE, an
Indian tribe established pursuant to
Executive Order; E.H. LOVENESS LUM-
BER SALES Co., an Oregon corporation
dba PINETOP LOGGING COMPANY, quali-
fied to do business in the State of Ari-
zona; BASIN BUILDING MATERIALS
COMPANY, an Oregon corporation dba
PINETOP LOGGING COMPANY, qualified to
do business in the State of Arizona,

Plaintiffs,

v.

JACK WILLIAMS, Governor of the State
of Arizona, et al.,

Defendants,

No. CIV 73-788
PCT WEC

PERMANENT
INJUNCTION AND
DECLARATORY
JUDGMENT AND
ORDER AWARDING
ATTORNEYS' FEES

Filed
March 11, 1981

After hearing Plaintiffs' Motion for Summary Judgment against Highway Department and Highway Commission Defendants and Motion for Award of Attorneys' Fees, the Court finds that there is no genuine dispute of material fact and that Plaintiffs are entitled to judgment as a matter of law as requested. The Court further finds that there is no just reason for delay in the entry of this Permanent Injunction and Declaratory Judgment and expressly directs its immediate entry. Permanent injunction should issue for the further reason that the Plaintiffs will suffer irreparable loss, injury, and damage in violation of their legal rights in the absence of a permanent injunction. The Court has entered separate Findings of Fact and Conclusions of Law on Plaintiffs' Motion for Award of Attorneys' Fees.

NOW, THEREFORE, IT IS ORDERED:

1. That this Permanent Injunction and Declaratory Judgment shall run against Robert M. Bracker, Chairman of the Arizona Department of Transportation Board; Armand Ortega, Vice Chairman of the Arizona Department of Trans-

portation Board; Edward J. McCarthy, Ralph A. Watkins, Jr., John W. McLaughlin, John Houston and William A. Erdman, members of the Board, Arizona Department of Transportation; and Philip Thorneycroft, Assistant Director, Arizona Department of Transportation, Motor Vehicle Division, their successors in office, their officers, agents, servants, employees, and attorneys and those persons in active concert and participation with them who receive actual notice of this order by personal service or otherwise, all of whom are referred to hereinafter as "Defendants."

2. That the Defendants are permanently enjoined and restrained from levying, collecting, or enforcing in any way against the White Mountain Apache Tribe or Pinetop Logging Company the Arizona Motor Carrier License Tax (Ariz. Rev. Stat. §§ 40-641 *et seq.*) or the Arizona Use Fuel Tax (Ariz. Rev. Stat. §§ 28-1551 *et seq.*) for, in connection with, or measured by any logging activities on the Fort Apache Indian Reservation, subject to paragraph 4 below.

3. That comprehensive federal regulation of Indian timber implicitly preempts and excludes the State of Arizona and the Defendants from levying, collecting, or enforcing in any way against the White Mountain Apache Tribe or Pinetop Logging Company the Arizona Motor Carrier License Tax (Ariz. Rev. Stat. §§ 40-641 *et seq.*) or the Arizona Use Fuel Tax (Ariz. Rev. Stat. §§ 28-1551 *et seq.*) for, in connection with, or measured by any logging activities on the Fort Apache Indian Reservation, subject to paragraph 4 below.

4. That nothing in this Permanent Injunction and Declaratory Judgment shall constitute an adjudication of whether the State of Arizona or the Defendants may levy, collect, or enforce against the Pinetop Logging Company the Arizona Motor Carrier License Tax or the Arizona Fuel Use Tax measured by logging activities of the Pinetop Logging Company conducted on state highways as defined in Ariz. Rev. Stat. § 28-1861(A) (1976), or measured by logging activities not performed for, or in association with, the White Mountain Apache Tribe.

5. That Plaintiffs have judgment against the named Defendants and their successors in office, in their official capacity, for Plaintiffs' costs and attorneys' fees pursuant to 42 U.S.C. § 1988 in the amount of \$206,012.07, together with costs claimed in their Statement of Costs, and as to amounts not yet billed to Plaintiffs by their attorneys beginning on the date of this Permanent Injunction and Declaratory Judgment. Plaintiffs may apply for additional attorneys' fees as such are incurred.

DATED at Phoenix, Arizona, this 9th day of March, 1981.

Walter E. Craig
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

WHITE MOUNTAIN APACHE TRIBE, an
Indian tribe established pursuant to
executive order, et al.,

Plaintiff,

v.

JACK WILLIAMS, Governor of the State
of Arizona, et al.,

Defendant.

No. CIV 73-788
PCT WEC

ORDER
AMENDING
JUDGMENT

Date
April 6, 1981

The plaintiffs having filed a motion to amend or alter judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, the defendants having responded thereto, and the Court being fully informed, IT IS ORDERED that the Injunction and Declaratory Judgment and Order Awarding Attorneys' Fees is altered and amended as follows: Paragraph 5 of the said order is amended and altered to read:

"That Plaintiffs have judgment against the named defendants and their successors in office, in their official capacity, for Plaintiffs' costs and attorneys' fees pursuant to U.S.C. § 1988 in the amount of \$206,012.07 together with costs claimed in their Statement of Costs, and for interest on all the foregoing sums at the rate of 10% per annum on the unpaid balance thereof from the date of this Permanent Injunction and Declaratory Judgment, March 11, 1981. Plaintiffs may apply for additional attorneys' fees as such are incurred."

Walter E. Craig
United States District Judge

Appendix G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

WHITE MOUNTAIN APACHE TRIBE, an
Indian tribe established pursuant to
Executive Order, et al.,

Plaintiffs,

v.

JACK WILLIAMS, Governor of the State
of Arizona, et al.,

Defendants.

No. Civ-73-788

PCT WEC

FINDINGS OF FACT
AND CONCLUSIONS

ON THE
PLAINTIFFS'
MOTION FOR AN
AWARD OF
ATTORNEYS' FEES
PURSUANT TO
42 U.S.C. § 1988

Filed

March 11, 1981

The plaintiffs having filed a motion for an award of attorneys' fees pursuant to 42 U.S.C. § 1988, the defendants having responded, the matter being fully briefed, oral argument having been heard, and the Court being fully informed, the Court makes and enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1.) The plaintiffs obtained a temporary restraining order and later a preliminary injunction by consent in this action restraining the defendants from regulating the relationship between the plaintiffs or from collecting use fuel or motor carrier license taxes from the plaintiffs from the period of time from 1969 until 1971.

2.) Pursuant to this Court's oral abstention order issued in January, 1974, the plaintiffs elected to submit their substantive federal claims, other than their claim for attorneys' fees pursuant to 42 U.S.C. § 1988, to be decided in the Arizona state courts.

3.) The Highway Department and Highway Commission defendants have vigorously resisted the plaintiffs' claims both in this Court and in the parallel state court action from the beginning of this litigation until the decision of the Supreme Court of the United States issued June 27, 1980, which upheld the plaintiffs' claims against the defendants.

4.) To the extent the defendants may no longer be resisting the plaintiffs' claims of immunity from the disputed use fuel and motor carrier license taxes, it is only because the defendants have exhausted their judicial remedies and have lost in the court of last resort. The defendants have twice tried to have the preliminary injunction lifted in this Court in contravention of the stipulation they entered into with the plaintiffs.

5.) After the plaintiffs filed their opening brief in the Arizona Court of Appeals, the Arizona Corporation Commission dropped its claim of authority to regulate on non-state roads for the plaintiff tribe on the reservation.

6.) The law firm of Jennings, Strouss & Salmon spent at least 1506.5 hours of work in this litigation from the beginning of the action in 1971 until December 15, 1980. The mentioned law firm probably spent more time than that on the litigation, which is not reflected in their billing sheets because Mr. Beus and Mr. Wake, attorneys in the firm, routinely under-logged time they spent on the matter. All the time mentioned was reasonably spent in the prosecution of this litigation. The fair market value of such services, considering the rates prevailing in Phoenix during the time in question, is \$158,000.00. Plaintiffs and their attorneys also incurred reasonable expenses in that period of time, excluding costs already taxed, in the amount of \$11,525.19.

7.) Plaintiffs' attorneys Caveness and DeRose reasonably spent 79.91 hours in the prosecution of this litigation from 1973 to 1975. The fair market value of those services is at least \$3,335.31. The plaintiffs and their attorneys Caveness and DeRose reasonably incurred expenses in that period of time of \$268.46.

8.) The plaintiffs' attorneys Michael J. Brown, P.C., reasonably spent 284.75 hours of time in the prosecution of this litigation, the fair market value of which is at least \$17,085.00.

9.) Since December 15, 1980, plaintiffs' attorneys Jennings, Strouss & Salmon have reasonably spent 166.0 hours in the prosecution of this motion and this litigation. The fair market value of that time is \$15,505.00. These attorneys have also reasonably incurred expenses in the amount of \$293.11 in that period of time.

10.) The reasonable and fair market value of the services rendered to date by the plaintiffs' attorneys, including expenses incurred, but excluding costs already taxed, is at least \$206,012.07.

CONCLUSION OF LAW

1.) This action arises under 42 U.S.C. § 1983. The Court has jurisdiction of it, therefore, pursuant to 28 U.S.C. § 1343(3).

2.) Any of the foregoing denominated Findings of Fact which more properly are considered Conclusions of Law shall be deemed Conclusions of Law.

3.) Any of the succeeding or foregoing denominated as Conclusions of Law which are more properly considered Findings of Fact shall be deemed to be Findings of Fact.

4.) Proceedings in the Arizona state courts parallel to this action was instituted by the plaintiffs pursuant to the Court's abstention order.

5.) In view of the abstention order and since both this action and the parallel state action have asserted rights protected by 42 U.S.C. § 1983, the provisions of 42 U.S.C. § 1988 permit an award of attorney's fees for the entire litigation, including the state court proceedings.

6.) Within the meaning of 42 U.S.C. § 1988, the plaintiffs are the prevailing parties in this action and the parallel state action and as such are entitled to attorneys' fees for these and the state court proceedings. *Williams v. Alioto*, 625 F.2d 845 (9th Cir. 1980).

7.) The amount of the award of attorneys' fees is to be determined with reference to the factors listed in *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975), cert. denied, 425 U.S. 951, 96 S.Ct. 1726, 48 L.Ed.2d 195 (1976).

8.) The defendants have failed to present evidence proving any reason why attorneys' fees should not be awarded the plaintiffs in this action.

9.) The time and labor required for this action was extensive due, in part, to the following: (a) the plaintiffs' need to seek an injunction from this Court to continue its logging operations during the pendency of this litigation; (b) the consideration of the case by three appellate courts and the necessity of preparing briefs for each court; (c) the vigorous opposition of the defendants, including their two attempts to lift the interim injunction to which they had consented; and (d) the novelty and difficulty of the case.

10.) The factors listed in the following paragraphs, in accordance with the ruling in *Kerr*, supra, warrant a higher award of attorneys' fees:

11.) The issues in the case were novel and difficult, as exemplified by the necessity of resorting to the Supreme Court of the United States for final vindication of the rights asserted.

12.) The skill required adequately to perform the services rendered the plaintiffs was high.

13.) At least since 1976 the plaintiffs' attorneys have prosecuted this litigation at agreed hourly rates of compensation which were known to the plaintiffs and their attorneys to be substantially less than the fair market rate for attorneys' services, and even less than the usual billing rates of these attorneys for routine matters not involving the expertise needed for the successful conduct of the litigation.

14.) The prosecution of this action by the plaintiffs' attorneys at less than the fair market rate precluded them from accepting more remunerative employment.

15.) In view of the fact that the briefing schedule and preparation necessary for argument to the Supreme Court is rigid and hurried, plaintiffs' counsel expended many hours in a short period, without regard to their other obligations.

16.) The decision of the United States Supreme Court has great value to the plaintiffs as a precedent.

17.) The plaintiffs' attorneys are experienced, skillful, and very capable. Their reputation in the community is high.

18.) The rights of the Indian tribe vindicated in this litigation are somewhat unpopular.

19.) In view of the foregoing, the Court concludes that the plaintiffs should be awarded attorneys' fees against the defendants in their official capacities to be paid from the treasury of the State of Arizona for the fair market value of the services rendered the plaintiffs by their attorneys in this action and the parallel state court action. The fair amount awarded the plaintiffs is \$206,012.07.

20.) Pursuant to the holding in *England v. Louisiana State Board of Med. Exam.*, 375 U.S. 411 (1964), the plaintiffs have a right to have their claim for attorneys' fees under 42 U.S.C. § 1988 decided on its merits in this Court, since that claim was not voluntarily submitted for decision to the state courts in the state litigation necessitated by the abstention order.

21.) As a matter of discretion and for the purpose of judicial economy the Court concludes that the plaintiffs' entire claims for attorneys' fees in all aspects, state and federal, of this litigation to date are to be determined in a single proceeding by this Court, as requested by the plaintiffs.

22.) In the event that plaintiffs incur additional fees subsequent to this order, an application for award to cover such attorneys' fees may be submitted later to this Court.

23.) A judgment consistent with the foregoing may be entered.

A-134

DATED at Phoenix, Arizona, this 9th day of March,
1981.

Walter E. Craig
United States District Judge

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

CENTRAL MACHINERY COMPANY, an
Arizona corporation,

Plaintiff-Appellee,

v.

STATE OF ARIZONA,

Defendant-Appellant.

1 CA-CIV 7779

DEPARTMENT D

OPINION

Filed

June 27, 1985

[Review granted by
Arizona Supreme
Court January 21,
1986]

Appeal from the Superior Court of Maricopa County

Cause No. C-297870

The Honorable William T. Moroney, Judge

AFFIRMED

Rodney B. Lewis

Attorney for Central Machinery Company

Sacaton

Robert K. Corbin, Attorney General

by Anthony B. Ching, Solicitor General

Attorneys for State of Arizona

Phoenix

MEYERSON, Judge

In *Maine v. Thiboutot*, 448 U.S. 1, 100 S. Ct. 2502, 65 L. Ed.2d 555 (1980), the United States Supreme Court held that 42 U.S.C. § 1983 provides a cause of action to enforce substantive rights granted by federal statutes. The issue in this case is whether the Indian trader statutes, 25 U.S.C.

§§ 261-64, create such rights thereby entitling plaintiff-appellee Central Machinery Company (Central Machinery) to recover attorneys' fees under 42 U.S.C. § 1988.¹ We hold that substantive rights are created by the Indian trader statutes and therefore affirm the trial court's judgment granting fees to Central Machinery.

I. BACKGROUND

This dispute began in 1973 when Central Machinery sold farm tractors to Gila River Farms, an enterprise of the Gila River Indian Tribe (Tribe). The State of Arizona imposed a transaction privilege tax on the sale of the tractors. The tax was passed on to Gila River Farms. Central Machinery paid the tax under protest and initiated state administrative proceedings to claim a refund.

Central Machinery's claim ultimately reached the United States Supreme Court. *Central Machinery Co. v. Arizona State Tax Comm'n*, 448 U.S. 160, 100 S. Ct. 2592, 65 L. Ed.2d 684 (1980). Relying upon its earlier decision in *Warren Trading Post Co. v. Arizona State Tax Comm'n*, 380 U.S. 685, 85 S. Ct. 1242, 14 L. Ed.2d 165 (1965), the Court held that the Indian trader statutes preempted Arizona's imposition of sales tax on the transaction.

On remand, Central Machinery attempted to recover attorney's fees under 42 U.S.C. § 1988. It argued that its preemption claim was cognizable under 42 U.S.C. § 1983 thereby entitling it to an award of fees. The superior court granted fees to Central Machinery² and defendant-appellant State of Arizona has filed this appeal.

II. 42 U.S.C. § 1983

The Civil Rights Act of 1871, 42 U.S.C. § 1983, establishes a cause of action on behalf of any party who has been

¹ The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, authorizes reasonable attorney's fees to the prevailing party in actions brought under certain statutes, including 42 U.S.C. § 1983.

² The parties agreed that Gila River Farms would bear the costs and legal fees throughout the litigation and that any recovery of fees would be transmitted to it.

injured, under color of law, through the deprivation of any "rights, privileges, or immunities secured by the Constitution and laws" of the United States. The question before the Supreme Court in *Maine v. Thiboutot* was "whether the phrase 'and laws,' as used in § 1983, means what it says, or whether it should be limited to some subset of laws." 448 U.S. at 4. The Supreme Court rejected the contention that the phrase "and laws" should be read as limited to civil rights or equal protection laws. The Court held that 42 U.S.C. § 1983 encompassed claims based on purely statutory violations of federal law and further concluded that the attorney's fees provisions of 42 U.S.C. § 1988 were therefore applicable.

In *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 101 S. Ct. 1531, 67 L. Ed.2d 694 (1981), the Supreme Court indicated in dictum that two factors may limit the existence of a cause of action under § 1983. First, the statute must provide substantive rights to those who seek to bring an action to enforce the statute. Second, the Court indicated that there might be no remedy under § 1983 if any express remedy contained in the statute is exclusive. The second limitation was expanded upon in *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, 101 S. Ct., 2615, 69 L. Ed.2d 435 (1981). In that decision, the Court found that expressly created statutory remedies in two federal statutes manifested congressional intent that a supplemental remedy under 42 U.S.C. § 1983 was precluded.

The Indian trader statutes make no reference to any statutory remedy. Therefore, we are not concerned in this decision with the second limiting factor enunciated by the Supreme Court. Rather, we are concerned with the first limitation, namely whether the Indian trader statutes create enforceable rights

III. INDIAN TRADER STATUTES

Comprehensive federal regulation of Indian traders has existed from 1790 until the present day. The Commissioner of Indian Affairs is vested with the "sole power and authority to appoint traders to the Indian tribes" and to specify the "kind and quantity of goods and the prices at

which such goods shall be sold to the Indians." 25 U.S.C. § 261. Pursuant to the authority of the Indian trader statutes, the Commissioner of Indian Affairs has promulgated detailed regulations prescribing the manner in which trade shall be carried on with Indians. See generally 25 C.F.R. §§ 140.1, -.26 (1984). In *Warren Trading Post Co.*, the United States Supreme Court held that the Indian trader statutes and the regulations promulgated thereunder preempted the ability of the State of Arizona to impose a sales tax upon a company engaged in retail trading business with Indians on the Arizona part of the Navajo Indian Reservation. In *Central Machinery Co. v. Arizona State Tax Comm'n*, the Court extended its holding in *Warren Trading Post Co.* to a situation involving an Indian trader who was not licensed and who did not have a permanent place of business on the reservation.

The Supreme Court's characterization of the Indian trader statutes in *Warren Trading Post Co.* is determinative of this appeal:

We think that assessment and collection of this tax would to a substantial extent frustrate the evident congressional purpose of ensuring that no burden shall be imposed upon Indian traders for trading with Indians on reservations except as authorized by Acts of Congress or by valid regulations promulgated under those Acts. This state tax on gross income would put financial burdens on appellant or the Indians with whom it deals . . . and could thereby disturb and disarrange the statutory plan Congress set up in order to protect Indians against prices deemed unfair or unreasonable by the Indian Commissioner.

380 U.S. at 690-91 (emphasis added). The Court's description of the Indian trader statutes reflects its conclusion that Congress' intent in passing the statutes was to "protect Indians against prices deemed unfair or unreasonable by the Indian Commissioner" We conclude that the Indian trader statutes therefore establish enforceable rights and thus fit within the phrase "and laws" contained in 42 U.S.C. § 1983.

See *Chase v. McMasters*, 573 F.2d 1011 (8th Cir. 1978), cert. denied, 439 U.S. 965, 99 S. Ct. 453, 58 L. Ed.2d 423 (1978).

IV. ANALYSIS

We believe that our conclusion is also supported by the decision of the Ninth Circuit Court of Appeals in *White Mountain Apache Tribe v. Williams*, No. 81-5348 (9th Cir. Feb. 7, 1984), rehearing granted, (April 25, 1984). In that case, the court held that preemption of Arizona state taxes by a federal law regulating the harvest and sale of tribal timber did not create rights enforceable under § 1983. The court's reasoning combined with the interpretation of the Indian trader statutes given by the Supreme Court in *Warren Trading Post Co.* requires that we reach the contrary result in the present case.

In *White Mountain Apache Tribe*, the court noted that the "availability of a § 1983 cause of action for state violations of federal statutory law depend[s] upon congressional intent in passing the statute at issue." Slip op. at 14. The court recognized that a preemption claim under a federal statute may give rise to a § 1983 cause of action. *Id.* at 16. But cf. *Gould, Inc. v. Wisconsin Dept. of Industry, Labor and Human Relations*, 750 F.2d 608 (7th Cir. 1984), review granted, 53 U.S.L.W. 3821 (U.S. May 20, 1985) (No. 84-1484). As the court noted, the question becomes one of congressional intent.³

³ Despite a persuasive dissent, a majority of the court found that the central purpose of the federal law regulating the harvest of timber on Indian reservations was merely to grant to the Secretary of the Interior authority to regulate the harvest and sale of the tribe's own timber. Thus, the court concluded that the statute created no new rights. The court further concluded that Congress' purpose in promoting tribal self-government likewise gave rise to no rights cognizable under § 1983. The court viewed the federal statute as allocating the power to tax the timber activities among different sovereigns and that the distribution of such powers between a state and an Indian tribe was outside the scope of § 1983.

The dissent concluded that the federal law reflected a congressional intention to benefit specially Indian tribal timberland owners and to confer federal rights upon them. The dissent appears to us to have the better argument.

In light of *Warren Trading Post Co.*, we must necessarily conclude that the Indian trader statutes do evidence a congressional intent to create enforceable rights. As explained by the United States Supreme Court, the purpose behind these statutes is to "protect Indians against prices deemed unfair or unreasonable by the Indian Commissioner." 380 U.S. at 691. We view this statement as an express indication by the Supreme Court that Congress intended that for the benefit and protection of Indians, the tribes were entitled to the right to be free from state taxation on their transactions with traders.

The State of Arizona relies heavily on *Consolidated Freightways Corp. v. Kassel*, 730 F.2d 1139 (8th Cir. 1984), cert. denied, _____ U.S. _____, 105 S. Ct. 126, _____ L. Ed.2d _____ (1984). In that decision, the plaintiff had been successful in invalidating Iowa's ban on 65-foot twin trailer trucks under the commerce clause. The plaintiff then sought fees alleging that the commerce clause claim was cognizable under § 1983. The court rejected the request finding that the commerce clause did not grant enforceable rights but rather allocated power between the state and federal governments. *Id.* at 1144. Thus, the decision is not at all analogous because here we are concerned with a supremacy clause claim predicated upon a federal law which has as its avowed purpose the protection of Indians in their business relationships with traders.

Our holding is also consistent with the Ninth Circuit decision in *Boatowners and Tenants Ass'n v. Port of Seattle*, 716 F.2d 669 (9th Cir. 1983). In that decision, the court rejected the contention that the plaintiffs had a § 1983 claim under the River and Harbor Improvements Act. The court found that the purpose of the act was to "improve navigation, enhance commerce, and reduce vehicle-vessel traffic problems, all to the benefit of the general public." *Id.* at 673 (emphasis added). The court concluded that there was no "evidence whatsoever of an intent" to create "any special benefit" for the class of pleasure craft owners. *Id.* at 673-74. The River and Harbor Improvements Act can easily be contrasted with the Indian trader statutes by virtue of the

Supreme Court's clear characterization of Congress' intent under the Indian trader statutes to benefit and protect Indians in their dealings with traders.

The Ninth Circuit Court of Appeals in *White Mountain Apache Tribe* acknowledges that claims under the supremacy clause may involve rights enforceable under § 1983. For the foregoing reasons, we hold that such a claim has been presented in this matter and we therefore affirm the ruling of the superior court.⁴

Bruce Meyerson, Presiding Judge

CONCURRING:

Sarah D. Grant, Judge

Levi Ray Haire, Judge

⁴ The State's final argument can be easily dismissed. The State argues that only Congress, not the courts, can authorize attorney's fees. *Alyeska Pipeline Serv. Co. v. Wilderness Society*, 421 U.S. 420, 95 S. Ct. 1612, 44 L. Ed.2d 141 (1975). Because the Indian trader statutes make no reference to fees, the State alleges that a fee award is impermissible. But Congress has expressly provided for an award of fees in § 1983 suits. 42 U.S.C. § 1988. We have determined that Central Machinery's claim is one properly brought under § 1983 and therefore the provisions of 42 U.S.C. § 1988 are applicable.

respondent Bureau (Bureau of Revenue, State of New Mexico) appeals. The Bureau raises three issues:

1. Whether Ramah's complaint sufficiently pled a 42 U.S.C. Section 1983 violation so as to allow an attorney's fee award under section 1988;

2. Whether the Bureau is a "person" within the meaning of Section 1983; and

3. Whether the complaint states a cause of action cognizable under Section 1983.

We answer each issue in the affirmative and, therefore, affirm.

In 1978, Ramah sued for a refund of gross receipts taxes paid. This court affirmed a judgment in favor of the Bureau. *Ramah Navajo School Board Inc. v. Bureau of Revenue*, 95 N.M. 708, 625 P.2d 1225 (Ct.App.1980), cert. quashed, 96 N.M. 17, 627 P.2d 412 (1981), rev'd, 458 U.S. 832 (1982). Ramah petitioned the United States Supreme Court which reversed on the basis that federal law preempted the assessment of the New Mexico tax on proceeds from the construction of a school on the Ramah Navajo reservation. *Ramah Navajo School Board Inc. v. Bureau of Revenue*, 458 U.S. 832 (1982).

Following remand, Ramah filed a motion for an award of attorney's fees under Section 1988, the Federal Civil Rights Attorney's Fees Awards Act. After a hearing, the trial court awarded to Ramah attorney's fees. The parties stipulated as to the amount; therefore, the issue on appeal involves only the legality of the award.

In the Civil Rights Attorney's Fees Awards Act of 1976, Congress authorized the awarding of attorney's fees in a number of specific civil rights actions. The Act, in pertinent part, provides for the allowance of attorney's fees:

[I]n any action or proceeding to enforce a provision of sections [42 U.S.C. §§] 1981, 1982, 1983, 1985 and 1986 title IX of Public Law 92-318, [or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or by charging a violation of, a provision of the United States Internal Revenue Code], or

Title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of costs.

42 U.S.C. § 1988. (Emphasis added.)

Ramah claims entitlement to Section 1988 attorney's fees because its original action qualifies as one to enforce a provision of Section 1983, and because it prevailed in the lawsuit.

Section 1983 provides:

Every person who, acting under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this action, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

In order for Ramah to succeed, it must have pled a Section 1983 cause of action; the Bureau must be a "person" within the meaning of Section 1983; and the cause of action must be one that is cognizable under Section 1983. The Bureau claims that Ramah fails each of those requirements. We now examine the Bureau's contentions.

1. Did the complaint sufficiently plead a Section 1983 violation?

In *Gomez v. Toledo*, the United States Supreme Court stated that by its "plain terms," Section 1983 requires "two-and only two-allegations." 446 U.S. 635, 640 (1980). First, the plaintiff must allege that he was deprived of a federal right. Second, the plaintiff must contend that the person who deprive him of the federally protected right was acting under the color of state or territorial law. *Id.*

While the Supreme Court, in *Gomez*, was discussing the standard of pleading required in a Section 1983 action when

qualified immunity is at issue, lower courts, in cases more factually similar to ours, have basically reiterated the *Gomez* standard of pleading. For instance, in *Harradine v. Board of Supervisors*, a voting rights case, the plaintiff argued that the distribution and apportionment of the Board violated the equal protection clause of the Fourteenth Amendment and sections of the New York constitution. 73 A.D.2d 118, 425 N.Y.S.2d 182 (1980). The plaintiff prevailed in the suit and then sought attorney's fees under Section 1988 even though he had specifically alleged, in his complaint or at trial, a Section 1983 violation. Accordingly, the question before the *Harradine* court, was whether a plaintiff who prevails in a state court suit, not arguing a Section 1983 violation but seeking to vindicate a federal civil right, should be allowed to recover Section 1988 attorney's fees. In answering that question, the court first noted that the purpose of Section 1988 was to encourage private citizens to act as private attorneys general in enforcing civil rights and that Section 1988 should be construed so as to effectuate that purpose. The court, therefore, allowed recovery on the basis that "[t]he Civil Rights Attorneys Fees Awards Act must be broadly applied to achieve its remedial purpose." *Id.* at _____, 425 N.Y.S.2d at 188.

Similarly, in *Gumbhir v. Kansas State Board of Pharmacy*, 231 Kan. 507, 646 P.2d 1078 (1982), *cert. denied*, 459 U.S. 1103 (1983), the plaintiff argued in his complaint that the Board's denial of his license application violated his rights under the First, Fifth, and Fourteenth Amendments as well as Article 1, Section 8 of the United State Constitution. The plaintiff failed to plead specifically a Section 1983 violation. The plaintiff prevailed at trial with the court not reaching his claimed constitutional violations. He then sought attorney's fees under Section 1988. While acknowledging that "the better practice is to specifically plead a violation of Section 1983," the Kansas Supreme Court invoked Kansas' liberal rules of notice pleading to rule that the plaintiff had adequately pled a violation of his civil rights. *Id.* at 514, 646 P.2d at 1085. See also *Fairbanks Correctional Center Inmates v. Williamson*, 600 P.2d 743 (Alaska 1979);

Boldt v. State, 101 Wis.2d 566, 305 N.W.2d 133, cert. denied, 454 U.S. 973 (1981). This result is consistent with New Mexico's liberal rules of notice pleading. See N.M. Civ.P. Rule 8 (Repl. Pamp. 1980); *Temple Baptist Church, Inc. v. City of Albuquerque*, 98 N.M. 138, 646 P.2d 565 (1982).

Ramah specifically alleged that the Bureau, in implementing its tax program, was acting "under color of the New Mexico Gross Receipts and Compensating Tax Act," and that the tax "constitutes interference by the State of New Mexico in Navajo self-government in violation of the Treaty of 1868 and the laws of the United States." [Emphasis added.] Based on these authorities and the pleadings, we hold that Ramah's failure to plead specifically a Section 1983 violation does not bar its recovery of Section 1988 attorney's fees.

Two recent New Mexico cases do not persuade us differently. Both are distinguishable from the present case. In *Garcia v. State Board of Education*, this court denied plaintiff's request for attorney's fees, a request first asserted on appeal. 102 N.M. 306, 694 P.2d 1371 (Ct.App.), cert. quashed, 102 N.M. 293, 694 P.2d 1358 (1985). We based our refusal on five grounds: first, the action was not brought under Section 1983; second, the plaintiff did not plead or prove that his civil rights were violated; third, the plaintiff did not prevail in the lawsuit; fourth, the plaintiff offered no proof that a Section 1988 award can be made when a Section 1983 claim is raised, for the first time, on appeal; and, fifth, Section 1988 does not authorize an award of attorney's fees in an administrative proceeding.

In this case, Ramah prevailed. Ramah also demonstrated that a Section 1988 award may be made even though the case was not specifically litigated under Section 1983. Ramah did argue, in its complaint, that a federal right had been violated. Finally, this case does not involve an administrative proceeding.

In *Chapman v. Luna*, the plaintiffs prevailed, in part, in their challenge to the Albuquerque/Bernalillo County Motor

Vehicle Emission Inspection Program. 101 N.M. 59, 678 P.2d 687 (1984). On remand to the district court, plaintiffs sought Section 1988 fees because the state supreme court had ruled that a provision of the emissions inspection program violated "equal protection standards." In plaintiffs' complaint, however, they had failed to refer specifically to the New Mexico Constitution, the United State Constitution, Section 1983, or Section 1988. The district court rejected plaintiffs' claim to Section 1988 fees, and the state supreme court affirmed. 102 N.M. 768, 701 P.2d 367, *cert. denied*, _____ U.S. _____, 106 S.Ct. 345 (1985).

The supreme court held that the plaintiffs were unable to show that a "deprivation of a federal constitutional right was raised and decided in their favor. . . ." 102 N.M. at 769, 701 P.2d at 368. The supreme court stated that in deciding *Chapman v. Luna*, while not specifically referring to the United States Constitution or the New Mexico Constitution, the court had based its decision on a violation of the New Mexico equal protection clause. Because the plaintiffs had not pled a federal claim and the court did not decide the case on the basis of a federal claim, the case was not decided under the federal Constitution. Therefore, an award of Section 1988 attorney's fees would not be appropriate. The court did indicate, however, that it might have reached a different conclusion if the plaintiffs had specifically pled a federal equal protection claim or a Section 1983 claim, and the court had decided the case on the basis of a federal claim. .

Chapman, therefore, is distinguishable from our case. Ramah did specifically plead violations of federal law, and the case was decided on federal grounds.

The Bureau also argues that Ramah erred in not expressly praying in its complaint for the award of Section 1988 attorney's fees. This argument is not convincing. By its express language, Section 1988 dictates that a "court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of costs." (Emphasis added.) Each of the counts in Ramah's complaint contained a prayer for relief which stated "for costs of this action, and further such relief

as to the Court seems just." (Emphasis added.) Additionally, the concluding prayer requested, in addition to the tax refund, the declaratory judgment, and the injunction, "Such other relief, *including costs*, interest, and so on, as the Court deems proper." (Emphasis added.) Therefore, Ramah's failure to pray expressly for Section 1988 attorney's fees is not fatal to the award of attorney's fees. *See also Maine v. Thiboutot*, 448 U.S. 1 (1980).

2. Whether the Bureau is a "person" within the meaning of Section 1983.

At the onset of this discussion, we recognize that the United States Supreme Court, in *Hutto v. Finney*, ruled that in passing Section 1988, Congress partially abrogated states' Eleventh Amendment immunity, pursuant to its plenary power to enforce the Fourteenth Amendment. 437 U.S. 678 (1978). The Court's ruling in *Hutto*, however, does not resolve the problem before us. In order to determine whether the trial court erred in awarding to Ramah Section 1988 attorney's fees, we must first decide whether Ramah pled a Section 1983 violation. Accordingly, we must determine whether the Bureau is a "person" within the meaning of Section 1983, and, therefore, capable of violating that section.

The question requires an analysis of congressional intent. For a long time, the answer, if not the rationale, was clear. Recent decisions, however, have resulted in a different understanding of the class of defendants made liable by Congress under Section 1983. Consequently, a more extensive analysis than was formerly required becomes necessary.

When Congress enacted Section 1983, it chose not to abrogate the state's sovereign immunity or Eleventh Amendment immunity. *Quern v. Jordan*, 440 U.S. 332 (1979). Sovereign immunity and Eleventh Amendment immunity are, of course, distinct concepts, but both immunities are designed to protect the same object—state government. *Civil Actions Against State Government: Its Divisions, Agencies and Officers*, (Winborne, ed. 1982). The Eleventh Amendment shields the operation of state governments from intrusions from the federal judiciary while sovereign immunity protects

state government affairs from interference by plaintiffs and state courts. *Id.* Therefore, when a Section 1983 suit is brought in federal court, the court analyzes whether the defendant is a "person" within the meaning of Section 1983 or, more meaningfully expressed, whether the Eleventh Amendment bars the suit from being brought against that defendant. Similarly, in Section 1983 actions brought in state courts, the court determines whether sovereignty immunity bars the suit. *Gumbhir v. Kansas State Board of Pharmacy*.

Before 1977, the belief generally held was that state agencies were not persons within the meaning of Section 1983. *Gumbhir v. Kansas State Board of Pharmacy*. In 1978, the United States Supreme Court handed down a landmark decision in *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978). In *Monell*, the Court ruled that the Eleventh Amendment did not bar suit under Section 1983 against municipalities and other local governments. Municipalities and local governments, therefore, were "persons" under Section 1983.

The Court's ruling, in *Monell*, created confusion in the lower courts. Some courts, in the wake of *Monell*, reasoned that there is no logical reason to distinguish between state and local agencies and, accordingly, ruled that states are "persons." *Stanton v. Godfrey*, 415 N.E.2d 103 (Ind.App.1981); *Atchison v. Nelson*, 460 F.Supp. 1102 (D.Wyo.1978). Most courts, however, have determined that *Monell* did nothing to alter either the Eleventh Amendment or sovereign immunity protective cloak of the states. *Holladay v. State of Montana*, 506 F.Supp. 1317 (D.Mont.1981) (memo.op.); *Ginter v. State Bar of Nevada*, 625 F.2d 829 (9th Cir.1980).

That the Eleventh Amendment is still a vital bar to a Section 1983 cause of action, in federal court, against a state or its agencies was articulated by the United States Supreme Court in *Quern v. Jordan*. The Court held that Congress, in enacting Section 1983, did not intend to destroy the states' Eleventh Amendment immunity from suits brought in federal court. *Quern*. It, therefore, logically follows that Con-

gress also did not intend, in adopting Section 1983, to abrogate the states' sovereign immunity from Section 1983 suits brought in state courts. Suits against states or their agencies, however, may be brought under Section 1983 in state or federal court if the state has waived its Eleventh Amendment or sovereign immunity, by expressly consenting to suit. *Boldt v. State*.

The Eleventh Amendment immunity, nevertheless, is not absolute. The United States Supreme Court has carved out an exception: prospective injunctive relief. In *Edelman v. Jordan*, the Court ruled that "a federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief . . . and may not include a retroactive award which requires the payment of funds from the state treasury. . . ." 415 U.S. 651, 677 (1974) (citations omitted). In *Milliken v. Bradley*, the Court ruled that the prospective relief can require the expenditure of state funds so long as the relief comes into effect prospectively. 433 U.S. 267 (1977).

Lower federal courts, when confronted with the question of whether the state or its agency is a "person" under Section 1983, appear to analyze what relief is sought. If the plaintiff seeks prospective injunctive relief, the Eleventh Amendment will not bar the suit. If, however, the plaintiff seeks monetary damages, the Eleventh Amendment precludes the cause of action. *Tayyari v. New Mexico State University*, 495 F.Supp. 1365 (D.N.M.1980); *Gay Student Services v. Texas A & M University*, 612 F.2d 160 (5th Cir.), cert. denied, 449 U.S. 1034 (1980).

State courts, however, have not uniformly distinguished on the basis of relief sought whether sovereign immunity is a bar to a Section 1983 action. In *DeVargas v. State, ex rel. New Mexico Department of Corrections*, in which the plaintiff sought damages under Section 1983, this court ruled that the suit was a "nullity" because "[t]he State and its Department of Corrections are not persons within the meaning of § 1983." 97 N.M. 447, 449, 640 P.2d 1327, 1329 (Ct.App.1981), cert. quashed, 97 N.M. 563, 642 P.2d 166 (1982). This court did not, however, explain the rationale for

its decision. Therefore, there are two possibilities as to the relevant law in New Mexico. First, it may be that the state and its agencies never are "persons" within the meaning of Section 1983; or, it may be that because the plaintiff sought damages in *DeVargas*, rather than prospective injunctive relief, the court ruled that the doctrine of sovereign immunity blocked the suit.

The second standard offers the better reasoned approach. While, as discussed earlier, the Eleventh Amendment and sovereign immunity are distinct concepts, each seeks to provide protection for the state treasuries. If the Eleventh Amendment does not bar a suit in which prospective injunctive relief is sought, there is no logical reason why sovereign immunity should bar such a suit in state court. Accordingly, the Kansas Supreme Court, in *Gumbhir v. Kansas State Board of Pharmacy*, ruled that "the sounder view in a case such as this, where prospective injunctive relief is sought, is that a state agency should be considered a 'person' under [§ 1983]." 231 Kan. at 513, 646 P.2d at 1084. See also *Woodbridge v. Worcester State Hospital*, 384 Mass. 38, _____, 423 N.E.2d 782, 786 n.7 (1981).

We note that in order to avoid the defense of Eleventh Amendment immunity, a plaintiff in federal court may be required to name an individual state officer as defendant. See generally *Milliken v. Bradley*, 433 U.S. 267, 289-290 (1977) (noting the history of the prospective-compliance exception reaffirmed in *Edelman v. Jordan*). The requirement that a plaintiff in federal court name a state officer as defendant is based on the fiction that in violating federally-protected rights, the state officer is "stripped of his official or representative character." *Ex parte Young*, 209 U.S. 123, 160 (1908). Because Ramah sued in state court, this particular aspect of Eleventh Amendment immunity is not relevant. We agree with the Kansas Supreme Court that, after *Monell*, a state and its agencies may be proper defendants in state court under Section 1983, provided principles of state sovereignty do not preclude recovery. See *Gumbhir*. For this reason, we reject the Bureau's contention on appeal that

Ramah's complaint was defective because it named the agency rather than its director.

Therefore, in order to determine if the Bureau is a person, we analyze separately each relief sought by Ramah. Ramah sought three remedies: first, a refund of the tax monies; second, a declaratory judgment that imposition of the tax, in this case, was beyond the jurisdiction of the Bureau; and, finally, a permanent injunction, enjoining the Bureau from further taxation of the construction project.

In its complaint, Ramah prayed for a tax refund, pursuant to NMSA Section 72-13-40(A)(2) (Supp. 1975) (now codified as NMSA 1978, Section 7-1-26(A)(2).) In enacting that statute, the legislature clearly consented to suit, allowing a claimant to bring an action against the state for a tax refund. We do not believe, however, that in enacting this statute, the state consented to suit under Section 1983.

The statute contains absolutely no reference to Section 1983, the United States Constitution, or the laws of the United States. See NMSA 1978, § 41-4-4 (Repl.Pamp.1982). Additionally, the request for the tax refund is a recovery more akin to money damages than to prospective injunctive relief. In *Edelman v. Jordan*, the plaintiffs argued that the defendants were not promptly processing, as authorized, assistance applications. The court of appeals allowed the plaintiffs to recover those funds which were denied by the tardy processing of the applications. The appeals court justified the refund on the basis of "equitable restitution." The United States Supreme Court rejected such a characterization and ruled that the refund violated the Eleventh Amendment. The Court stated that such an award was "in practical effect indistinguishable in many aspects from an award of damages against the State." 415 U.S. at 668. See *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459 (1945) (Eleventh Amendment bars suit in federal court for tax refund).

We, therefore, hold that in allowing suits against the state for tax refunds, the legislature did not intend to waive the state's sovereign immunity for suits brought under Section

1983. See *Boldt v. State*. Furthermore, Ramah's request for a tax refund essentially was a request for "equitable restitution." If posed in terms of Section 1983, the claim would have been barred by the doctrine of sovereign immunity.

Next, Ramah requested a declaratory judgment ruling that the imposition of the gross receipts tax, in this case, was beyond the jurisdiction of the Bureau. Ramah requested the declaratory judgment pursuant to the New Mexico Declaratory Judgment Act. NMSA 1953, §§ 22-6-1 through 22-6-18 (Supp.1975) (now codified at NMSA 1978, §§ 44-6-1 through 44-6-15). Section 22-6-16 of the 1975 supplement provides:

For the purpose of the Declaratory Judgment Act, the state of New Mexico, or any official thereof, may be sued and declaratory judgment entered when the rights, status or other legal relations of the parties call for a construction of the Constitution of the state of New Mexico, the Constitution of the United States or any of the laws of the state of New Mexico or the United States, or any statute thereof.

(Citation omitted.)

While this statute contains no express reference to Section 1983, it does provide that the state has waived its sovereign immunity for the purpose of suits seeking "a construction of" the Constitution and laws of the United States. Such declarations do not entail awards of money damages. Therefore, it is completely consistent with the notions of sovereign immunity to rule that for the purpose of Section 1983 causes of action seeking declaratory relief, the state has waived its sovereign immunity.

In its complaint, Ramah requested an interpretation of the New Mexico Constitution, the United States Constitution, and the laws of the United States. Section 22-6-16 is, therefore, precisely on point. For purposes of the declaratory judgment in this action, New Mexico has consented to suit.

Finally, Ramah sought a permanent injunction against the imposition of the gross receipts tax on the school construction project. This clearly represents a request for prospective injunctive relief. The doctrines of Eleventh Amendment and

sovereign immunity do not bar such suits. *Edelman v. Jordan*; *Gumbhir v. Kansas State Board of Pharmacy*. Therefore, for the purpose of the prospective injunctive relief, the Bureau is considered a "person" within the meaning of Section 1983.

After separately analyzing the three remedies which Ramah sought, it becomes apparent that the Bureau may not be considered a "person" for purpose of the refund (because sovereign immunity precludes such a claim being brought under Section 1983), but that the Bureau may be considered a "person" for purposes of the declaratory and injunctive relief. Such inconsistency is not fatal to Ramah's claim. In *Edelman v. Jordan*, the plaintiffs sought both damages and injunctive relief. Relying upon the Eleventh Amendment, the Court ruled that the suit was improper to the extent that monetary liability was sought. The suit was proper, however, insofar as prospective injunctive relief was requested. See also *Milliken v. Bradley*.

Applying that analysis to our case, the fact that the Bureau is not a "person" subject to liability under Section 1983 for the purpose of the refund recovery would not foreclose Ramah's statement of a cause of action under that section. Because the Bureau is considered a "person" for purposes of the declaratory and injunctive recoveries, sovereign immunity concerns do not foreclose the determination of whether, in its complaint, Ramah stated a cause of action under Section 1983.

3. Whether Ramah alleged the violation of a right actionable under Section 1983.

That Ramah sufficiently alleged that the Bureau, acting under color of state law, interfered in Navajo self-government in violation of the Treaty of 1868 and the laws of the United States does not of itself justify an award of attorney's fees under Section 1988. There must be a "deprivation of any rights, privileges, or immunities secured by the Constitution and laws." In short, there must be a violation of a federally protected right.

Prior to 19 , the prevailing attitude was that the phrase "and laws" was limited to civil rights or equal protection laws. See *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600 (1979). In a 1980 decision, *Maine v. Thiboutot*, the United States Supreme Court, however, radically expanded the scope of Section 1983 protection. 448 U.S. 1 (1980). Relying, essentially, upon the plain meaning of the language of Section 1983, the Court held that because Congress had attached "no modifiers" to the phrase "and laws," Section 1983 encompassed violations of federal statutory laws. *Id.* at 5. Accordingly, since the statutory action was appropriately brought as a Section 1983 action, and since Section 1988 makes no exception for statutory violations of Section 1983, Section 1988 attorney's fees clearly applied to that case.

Since deciding *Thiboutot*, however, the Court has narrowed the expansive scope of its ruling. Two limitations now preclude suit under Section 1983 based upon statutory violations. The first limitation arises when Congress includes within the legislation comprehensive remedial procedures. *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1 (1981). The second limitation is more pertinent to the issue before us. In *Pennhurst State School and Hospital v. Halderman*, the Court ruled that in order for a statutory violation to give rise to a Section 1983 violation, the federal statute must have created a right, privilege, or immunity. 451 U.S. 1 (1981).

Because the Bureau relies heavily on *Pennhurst* in arguing that a federally protected right was not at issue in this case, we shall analyze *Pennhurst* in some depth. In *Pennhurst*, residents of a state hospital for the care of the mentally retarded challenged their conditions of confinement. The Third Circuit Court of Appeals issued a ruling in favor of the residents, holding that the "bill of rights" provision of the Developmentally Disabled Assistance and Bill of Rights Act had been violated. *Halderman v. Pennhurst State School and Hospital*, 612 F.2d 84 (3d Cir.1979) (en banc).

On appeal, the Supreme Court, in determining whether Congress had intended, in passage of the Act, to create substantive, enforceable rights, first pinpointed the source of Congress' power to legislate. The Court concluded that the origin of the legislative power was Congress' spending power. When, pursuant to a federal grant program, Congress imposes enforceable, financial obligations on the states, Congress must "speak with a clear voice" in order to "enable the States to exercise their choice [to participate in the program] knowingly, cognizant of the consequences of their participation." 451 U.S. at 17. Because the "bill of rights" section of the Act contained no such express language, the Court held that the "bill of rights" was essentially precatory and, as such, unenforceable.

Ramah, in its complaint, based its suit on two, inter-related theories which are relevant to this appeal. The first theory was that the Bureau's imposition of the gross receipts tax on the school construction project unduly interfered with Navajo self-government, pursuant to the Indian Self-Determination and Educational Assistance Act (25 U.S.C. §§ 450a-450n) and the Treaty of 1868. Second, Ramah argued that the Supremacy Clause barred the imposition of the gross receipts tax because the collection of the tax burdened and interfered with "a clear federal policy and program for the education of Indian children."

The Bureau is correct in its assertion that the Supremacy Clause, alone, does not create federal substantive rights but merely is a policy of federalism. See *Chapman v. Houston Welfare Rights Organization*. The Indian Self-Determination and Education Assistance Act provides no broad remedial procedures so the *Middlesex* limitation is not applicable. Ramah does not disagree; therefore, the appellate issue is whether Congress has created a federally-protected right which New Mexico violated in collecting the gross receipts tax. Under *Pennhurst*, we must examine the origin and nature of the Indian Self-Determination and Educational Assistance Act in order to resolve the issue. The Bureau contends that the Act merely declares federal policy. We disagree.

Congress, in its statement of findings and its declaration of the policy of the Act provided:

§ 450. Congressional statement of findings

(a) The Congress, after careful review of the Federal Government's historical and special legal relationship with, and resulting responsibilities to, American Indian people, finds that—

(1) the prolonged Federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people and their communities by depriving Indians of the full opportunity to develop leadership skills crucial to the realization of self-government, and has denied to the Indian people an effective voice in the planning and implementation of programs for the benefit of Indians which are responsive to the true needs of Indian communities; and

(2) the Indian people will never surrender their desire to control their relationships both among themselves and with non-Indian governments, organizations, and persons.

(b) The Congress further finds that—

(1) true self-determination in any society of people is dependent upon an educational process which will insure development of qualified people to fulfill meaningful leadership roles;

(2) the Federal responsibility for and assistance to education of Indian children has not effected the desired level of educational achievement or created the diverse opportunities and personal satisfaction which education can and should provide; and

(3) parental and community control of the educational process is of crucial importance to the Indian people.

450a. Congressional declaration of policy

(a) The Congress hereby recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational as well as other Federal services to Indian com-

munities so as to render such services more responsive to the needs and desires of those communities.

(b) The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with and responsibility to the Indian people through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from Federal domination of programs for and services to Indians to effective and meaningful participations by the Indian people in the planning, conduct, and administration of those programs and services.

(c) The Congress declares that a major national goal of the United States is to provide the quantity and quality of educational services and opportunities which will permit Indian children to compete and excel in the life areas of their choice, and to achieve the measure of self-determination essential to their social and economic well-being.

25 U.S.C. §§ 450, 450a.

At first examination, the Act might arguably fall within the limitation *Pennhurst* placed upon federal statutory violations giving rise to a Section 1983 proceeding. As the Bureau argues, it could be that the Act "merely declares the federal government's policy of encouraging Indian self-government and Indian control of Indian education." Cases which the Bureau cites lend some support to that position. For instance, in *Perry v. Housing Authority of the City of Charleston*, the tenants of public housing projects sought declaratory and injunctive relief from indecent housing. 664 F.2d 1210 (4th Cir.1981). They alleged that the defendant's violation of various housing acts gave rise to a Section 1983 violation. The court ruled, however, that the acts created no federally protected substantive rights. Rather, the federal appropriations were designed to assist the states in remedying poor housing conditions. See also *Weems v. Pierce*, 534 F.Supp. 740 (C.D.111.1982) (federal housing acts created no right to compel aid recipients to provide rental assistance); and *Dopico Goldschmidt*, 518 F.Supp. 1161 (S.D.N.Y.1981) (funding statutes created no substantive rights of handicapped access to mass transit). Applying a similar argument in our case, the Bureau contends that the

Self-Determination and Educational Assistance Act conferred no rights upon Ramah but merely articulated Congress' encouragement of and assistance in the realization of Indian self-government and self-education.

The Bureau's argument, however, ignores the precise factual setting of this lawsuit. This case does not involve a federal/state funding statute such as generated the *Pennhurst* ruling. This case involves the unique relationship between the federal government and the Indian tribes. The source of Congress' power to legislate in federal grant cases is its spending power. In the grant cases, valid concerns legitimate courts' reluctance to interpret language in grant programs as creating substantive, enforceable federal rights. As one commentator has pointed out:

Damages awards and attorney's fees, for example, may deplete funds from the very purposes which the program was meant to serve. There is the realistic possibility that, at least in the case of marginal programs, governments will decline to participate if they see serious, and unpredictable, costs. Additionally, extensive judicial involvement blurs matters of accountability.

Brown, *Whither Thiboutot? Section 1983, Private Enforcement, and the Damages Dilemma*, 33 De Paul L.Rev. 31, 55 (1984).

In our case, however, the origin of Congress' legislative authority was the Indian Commerce Clause. U.S. Const. art. 1, § 8, cl. 3. Concerns in the federal grant area, which inhibit *Thiboutot*, are not at issue here. Under the Indian Commerce Clause, Congress has broad authority to regulate tribal affairs. *Morton v. Mancari*, 417 U.S. 535 (1974). Within that grant of power is the recognition of the guardian-ward relationship which exists between the federal government and the Indian tribes. *Id.*; *U.S. v. Sandoval*, 231 U.S. 28 (1913). The guardian-ward relationship is based upon the tribes dependence on the federal government "to aid the Indian in coping with an alien civilization which has inexorably altered the Indian's traditional way of life." Comment, *The Indian Battle for Self-Determination*, 58 Calif. L. Rev. 445, 450 (1970). Based upon this unique relationship, Congress, in enacting the Self-Determination and Educational Assis-

tance Act, granted to the Indians the *right* to coordinate the education of their children on the reservation, in express recognition of the right's "crucial importance to the Indian people." 25 U.S.C. § 450(a)(3). By implication, Congress also granted the tribes an *immunity* from state taxation. The Bureau, by imposing the gross receipts tax on the school construction job, not only violated that right but also that immunity. See *Chase v. McMasters*, 573 F.2d 1011 (8th Cir.), *cert. denied*, 439 U.S. 965 (1978).

In its decision in this case, the United States Supreme Court not only recognized that the federal and tribal interests arise from the Indian Commerce Clause, but also recognized an additional, independent source, "the semi-autonomous status of Indian tribes." 458 U.S. at 837. Either of these "independent but related" interest bar exercises of state authority over commercial activity on Indian reservations. The Court quoted with approval:

"[e]ither [interest], standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members. They are related, however, in two important ways. The right of tribal self-government is ultimately dependent on and subject to the broad power of Congress. Even so, traditional notions of Indian self-government are so deeply engrained in our jurisprudence that they have provided an important 'backdrop, . . . against which vague or ambiguous federal enactments must always be measured."

Id. at 837-38, quoting from *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980).

While the Court relied, in its holding, on the Indian Commerce Clause, the result we reach today also finds support in the second barrier which the Court indicated could be used to block state intrusion on commercial activity on the reservation, the semi-autonomous status of the Indian tribes. The tribe's *right* of self-government, however, is limited by broad Congressional power. *Id.* Congress, in our case, however, did not abrogate that tribal right but articulated that right in the Indian Self-Determination and Educational Assistance

Act. Congress, thereby, gave the full force and effect of federal law to the tribal right to control the educational processes on the reservation.

Our discussion might end here except for three cases concerning tribal claims for Section 1988 attorney's fees which, we believe, merit discussion. In *White Mountain Apache Tribe v. Williams*, No. 81-5348 (9th Cir. Dec. 19, 1985), the Arizona Highway Department and the Arizona Highway Commission assessed a tax upon a logging company which had contracted with the White Mountain Apache Tribe. The tribe had organized a tribal enterprise to engage in the harvest of timber. The United States Supreme Court ruled that the state taxes were preempted by a comprehensive federal regulatory plan which supervised the harvest and sale of tribal timber. *White Mountain Apache Tribe v. Bracker*. The tribe then requested an award of Section 1988 attorney's fees which the district court granted, and the Ninth Circuit Court of Appeals reversed. *White Mountain Apache Tribe v. Williams*, No. 81-5348 (9th Cir. Feb. 7, 1984). When we filed our first opinion, in this case, the Ninth Circuit had decided to reconsider its ruling. Since the filing of our first opinion, the Ninth Circuit has issued its second opinion, again reversing the district court. Because the Bureau relies heavily on this decision, we discuss it.

White Mountain is distinguishable from our case in two respects. First, the federal statutes at issue in *White Mountain* were regulatory in nature. There was no evidence of Congressional intent to create individual rights; whereas, in our case, the entire basis of the litigation was to provide a school for the Ramah children. While education does not rise to the level of a fundamental right, for equal protection purposes, "education is perhaps the most important function of state and local governments." *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 29 (1973), quoting from *Brown v. Board of Education*, 347 U.S. 483, 493 (1954). Similarly, it stands to reason that the education of Indian children is one of the most important functions that the tribal government performs. There can be no doubt but that the Self-Determination and Educational Assistance Act con-

cerns "individual rights." If Ramah had not undertaken to operate a school system, the tribal children would have been forced either to curtail their educations or to leave the reservation in order to obtain educations. Either option would have been contrary to the essence of the Act.

Second, and more importantly, *White Mountain* is not inconsistent with the result which we reach today. The Ninth Circuit, relying on *Chapman v. Houston Welfare Rights Organization*, held that a violation of the Supremacy clause would not provide the basis for a Section 1983 cause of action. That holding is in accord with our result. Our case, however, is distinguishable. Congress here has created a federally enforceable right. Individual rights are presently at issue.

After we heard oral argument in this case, the Bureau directed our attention to additional authority, a recent federal district court opinion. *Yakima Indian Nation v. Whiteside*, No. C-83-604-JLQ (D.Wash. filed September 11, 1985). In that case, the court refused to find that the tribe's "right" to be free from the county's zoning authority was a federally enforceable right for purposes of Section 1983. According to the court, a Supremacy Clause violation alone, as in *White Mountain*, does not give rise to a Section 1983 cause of action. The court's holding also is consistent with the result we reach today. As with *White Mountain*, our case, however, is distinguishable. A right, cognizable under Section 1983, is here.

In a third recent case, the Arizona Court of Appeals ruled that the Indian trader statutes created rights enforceable under Section 1983. *Central Machinery Co. v. Arizona*, 12 Ind.L.Rptr. 5073 (June 27, 1985). Therefore, the Gila River Indian Tribe could recover Section 1988 attorney's fees. The tribe had prevailed in a lawsuit in which the United States Supreme Court ruled that the Indian trader statutes preempted Arizona's imposition of a transaction privilege tax upon a non-Indian tractor merchant. *Central Machinery Co. v. Arizona State Tax Commission*, 448 U.S. 160 (1980). The merchant, as in our case, had passed the tax on to the Indian purchasers.

In determining whether Congress intended to create a right enforceable under Section 1983, the Arizona court looked first to the purpose of the federal Indian trader statutes. Because the avowed Congressional intent was to protect the Indians from state taxation of their transactions with traders, the court translated that Congressional purpose into a federally protected right "to be free from state taxation on their transactions with traders." 12 Ind.L.Rptr. at 5074. The court's conclusion was reinforced by its finding that Congress intended to confer a "special benefit" upon the tribe.

If the *Central Machinery* standard is applied to the facts in our case, the inescapable conclusion is that the Self-Determination and Educational Assistance Act created rights enforceable under Section 1983. The express purposes of the Act is to promote Indian self-determination and to facilitate tribally coordinated educational opportunities. Accordingly, those purposes can be translated into federally protected rights. Additionally, the language of the Act is not general or regulatory in nature but specifically aims toward providing a "special benefit" for tribal members. *See also The Confederated Salish and Kootenai Tribes of the Flathead Reservation v. Moe*, 392 F.Supp. 1297 (D.Mont.1974).¹

In summary, we hold that the Indian Self-Determination and Educational Assistance Act created a right enforceable under Section 1983, and, therefore, that the trial court did not err in awarding Section 1988 attorney's fees to Ramah. First, the language and history of the Act evince a Congressional intent to create a tribal right to coordinate the education of its children. Second, recognition of the Indian right

¹ In *Moe*, the district court ruled that the tribe's allegation that the state had violated the Commerce Clause was sufficient to state a claim under Section 1983. In reviewing the district court's decision, the United States Supreme Court found it unnecessary to reach that question. 425 U.S. 463, 475, n.14 (1976). *But see Consolidated Freightways Corp. of Delaware v. Kassel*, 556 F.Supp. 740 (S.D.Iowa 1983) (Commerce Clause creates no rights enforceable under § 1983). The Bureau's strong reliance upon *Kassel* might be misguided because *Kassel* is not a case involving Indians.

of self-government provides a 'backdrop ... against which vague or ambiguous federal enactments must always be measured." *White Mountain Apache Tribe v. Bracker*, 448 U.S. at 143. And, finally, Section 1988 should be construed liberally in order to realize the achievement of Section 1988's broad remedial purposes. *Harradine v. Board of Supervisors*.

The fact that Ramah prevailed in the litigation on the preemption claim rather than the violation of self-determination claim is not relevant. Section 1988 attorney's fees are awarded so long as the prevailing party "essentially succeeds in obtaining the relief he seeks in his claim on the merits." *Bagby v. Beal*, 606 F.2d 411, 415 (3d Cir.1979).

The judgement below is affirmed. Ramah shall recover its costs on appeal.

IT IS SO ORDERED.

WILLIAM W BIVINS, Judge

WE CONCUR:

A. JOSEPH ALARID, Judge

PAMELA B. MINZNER, Judge



**CONSTITUTIONAL PROVISIONS, STATUTES,
AND REGULATIONS INVOLVED**

1. *United States Constitution Art. I § 8*

The Congress shall have Power . . .

...

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

2. *United States Constitution Art. IV § 3*

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

3. *United States Constitution, Amend. 14*

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

...

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

4. *42 U.S.C. § 1983.*

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of

this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

5. 42 U.S.C. § 1988.

Proceedings in vindication of civil rights; attorney's fees

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

6. 25 U.S.C. § 196 (1976)

Sale or other disposition of dead timber

The President of the United States may from year to year in his discretion under such regulations as he may prescribe authorize the Indians residing on reservations or allotments, the fee to which remains in the United States, to fell, cut, remove, sell or otherwise dispose of the dead timber standing, or fallen, on such reservation or allotment for the sole benefit of such Indian or Indians. But whenever there is reasonable cause to believe that such timber has been killed,

burned, girdled, or otherwise injured for the purpose of securing its sale under this section then in that case such authority shall not be granted.

7. 25 U.S.C. § 406 (1976)

Sale of timber on lands held under trust—Deductions for administrative expenses; standards guiding sales

(a) The timber on any Indian land held under a trust or other patent containing restrictions on alienations may be sold by the owner or owners with the consent of the Secretary of the Interior, and the proceeds from such sales, after deductions for administrative expenses to the extent permissible under section 413 of this title shall be paid to the owner or owners or disposed of for their benefit under regulations to be prescribed by the Secretary of the Interior. It is the intention of Congress that a deduction for administrative expenses may be made in any case unless the deduction would violate a treaty obligation or amount to a taking of private property for public use without just compensation in violation of the fifth amendment to the Constitution. Sales of timber under this subsection shall be based upon a consideration of the needs and best interests of the Indian owner and his heirs. The Secretary shall take into consideration, among other things, (1) the state of growth of the timber and the need for maintaining the productive capacity of the land for the benefit of the owner and his heirs, (2) the highest and the best use of the land, including the advisability and practicality of devoting it to other uses for the benefit of the owner and his heirs, and (3) the present and future financial needs of the owner and his heirs.

(b) Upon the request of the owners of a majority Indian interest in land in which any undivided interest is held under a trust or other patent containing restrictions on alienations, the Secretary of the Interior is authorized to sell all undivided Indian trust or restricted interests in any part of the timber on such land.

(c) Upon the request of the owner of an undivided but unrestricted interest in land in which there are trust or restricted Indian interests, the Secretary of the Interior is

authorized to include such unrestricted interest in a sale of the trust of restricted Indian interests in timber sold pursuant to this section, and to perform any functions required of him by the contract of sale for both the restricted and the unrestricted interests, including the collection and disbursement of payments for timber and the deduction from such payments of sums in lieu of administrative expenses.

(d) For the purposes of this Act, the Secretary of the Interior is authorized to represent any Indian owner (1) who is a minor, (2) who has been adjudicated non compos mentis, (3) whose ownership interest in a decedent's estate has not been determined, or (4) who cannot be located by the Secretary after a reasonable and diligent search and the giving of notice by publication.

(e) The timber on any Indian land held under a trust or other patent containing restrictions on alienations may be sold by the Secretary of the Interior without the consent of the owners when in his judgement such action is necessary to prevent loss of values resulting from fire, insects, disease, windthrow, or other natural catastrophes.

8. 25 U.S.C. § 407 (1976)

Sale of timber on unallotted lands

The timber on unallotted lands of any Indian reservation may be sold in accordance with the principles of sustained yield, or in order to convert the land to a more desirable use, under regulations to be prescribed by the Secretary of the Interior, and the proceeds from such sales, after deductions for administrative expenses pursuant to section 413 of this title, shall be used for the benefit of the Indians who are members of the tribe or tribes concerned in such manner as he may direct.

9. 25 U.S.C. § 466 (1976)

Indian forestry units; rules and regulations

The Secretary of the Interior is directed to make rules and regulations for the operation and management of Indian forestry units on the principle of sustained-yield management, to restrict the number of livestock grazed on Indian range units to the estimated carrying capacity of such ranges, and

to promulgate such other rules and regulations as may be necessary to protect the range from deterioration, to prevent soil erosion, to assure full utilization of the range, and like purposes.

10. 25 U.S.C. § 476 (1976)

Organization of Indian tribes; constitution and bylaws; special election

Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and bylaws, when ratified as aforesaid and approved by the Secretary of the Interior, shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws.

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget and the Congress.

11. 25 C.F.R. §§ 141.3 and 141.4 (1979)

§ 141.3 Objectives.

(a) The following objectives are to be sought in the management of unallotted Indian forest lands in accordance with the principles of sustained yield:

(1) The preservation of such lands in a perpetually productive state by providing effective protection, by applying sound silvicultural and economic principles to the harvesting of the timber, and by making adequate provision for new forest growth as the timber is removed.

(2) The regulation of the cut in a manner which will insure method and order in harvesting the tree capital, so as to make possible continuous production and a perpetual forest business.

(3) The development of Indian forests by the Indian people for the purpose of promoting self-sustaining communities, to the end that the Indians may receive from their own property not only the stumpage value, but also the benefit of whatever profit it is capable of yielding and whatever labor the Indians are qualified to perform.

(4) The sale of Indian timber in open competitive markets in accordance with good business practices on reservations where the volume that should be harvested annually is in excess of that which is being developed by the Indians.

(5) The preservation of the forest in its natural state wherever it is considered, and the authorized Indian representatives agree, that the recreational or aesthetic value of the forest to the Indians exceeds its value for the production of forest products.

(6) The management of the forest in such a manner as to retain its beneficial effects in regulating water runoff and minimizing erosion.

(7) The preservation and development of grazing, wildlife, and other values of the forest to the extent that such action is in the best interest of the Indians.

(b) Similar objectives are sought in the management of allotted Indian forest lands, but, in addition, the sales of

timber shall be based upon a consideration of the needs and best interests of the Indian owner and his heirs. The Secretary shall take into consideration, among other things:

(1) The state of growth of the timber and the need for maintaining the productive capacity of the land for the benefit of the owner and his heirs.

(2) The highest and best use of the land, including the advisability of devoting it to other uses for the benefit of the owner and his heirs.

(3) The present and future financial needs of the owner and his heirs.

§ 141.4 Sustained-yield management.

In accordance with the objectives set forth in § 141.3, the harvest of timber from Indian forest lands will not be authorized until there have been prescribed practical methods of cutting, based on sound silvicultural principles. Cutting schedules shall be directed toward the salvage of timber that is deteriorating as a result of fire damage, insect infestation, disease, over-maturity or other cause; and toward achieving an approximate balance between maximum net growth and harvest during each cutting cycle.

For all Indian reservations of major importance from an industrial forestry standpoint, management plans for the forest resource shall be prepared by the Bureau of Indian Affairs, and revised as needed. The plans shall contain a statement of the manner in which the policies of the Bureau of Indian Affairs are to be applied on the forest, with a definite plan of silvicultural management and a program of action, including a cutting schedule, for a specified period in the future.

12. *Amended Constitution and Bylaws of the White Mountain Apache Tribe of the Fort Apache Indian Reservation, Arizona (Excerpts)*

...

PREAMBLE

We, the White Mountain Apache Tribe of the Fort Apache Indian Reservation, Arizona, in order to form a

more representative organization, to exercise the duties and responsibilities of a representative tribal government, to conserve and develop our tribal lands and resources for ourselves and our children, to provide a higher standard of living, better home life and better homes within the reservation to extend to our people the right to form business and other organizations, do adopt this Constitution and Bylaws as a guide to our self-governing program.

ARTICLE I - STATEMENT OF PURPOSE

Section 1. In our relation to the United States Government, a relation similar to that which a town or a county has to a State and Federal Government, our own internal affairs shall be managed, insofar as such management does not conflict with the laws of the United States, by a governing body which shall be known as the White Mountain Apache Tribal Council.

ARTICLE II - TERRITORY

The authority of the White Mountain Apache Tribe, of Arizona, shall extend to all of the territory within the exterior boundaries of the Fort Apache Indian Reservation as established by the Act of Congress, June 7, 1897, and to such other lands as the United States may acquire for the benefit of the tribe, or which the tribe may acquire for itself

...

ARTICLE V - POWERS OF THE COUNCIL

Section 1. In addition to all powers vested in the White Mountain Apache Tribal Council by existing law, the White Mountain Apache Tribal Council shall exercise the following powers, subject to any limitations imposed by the Constitution or the Statutes of the United States applicable to Indians or Indian tribes, and subject further to all expressed restrictions upon such powers contained in this constitution and bylaws:

(a) To represent the tribe and act in all matters that concern the welfare of the tribe, and to make decisions not inconsistent with or contrary to this Constitution and Bylaws of the Constitution and Statutes of the United States applicable to Indians or Indian tribes.

(b) To negotiate, make and perform contracts and agreements of every description, not inconsistent with law or this Constitution and subject to the review and approval of the Secretary of the Interior where such review or approval is required by statute or regulation, with any person, association, or corporation, with any municipality or any county, or with the State of Arizona or the United States, including agreements with the State of Arizona for rendition of public services.

...

(e) To veto the sale, disposition, lease or encumbrance of tribal lands, interests in lands, tribal funds or other tribal assets that may be authorized by any agency or employee of the Government.

(f) To protect and preserve the wildlife, natural resources and water rights of the tribe, to regulate hunting and fishing on the reservation.

(g) To cultivate Indian arts, crafts, and cultures.

(h) To regulate the uses and disposition of tribal property.

(i) To manage all economic affairs and enterprises of the tribe including tribal lands, timber, sawmills, flour mills, community stores, and any other tribal activities.

(j) To accept grants or donations from any person, State or the United States.

(k) To appropriate tribal funds for tribal purposes and to expend such funds in accordance with an annual budget approved by the Secretary of the Interior.

(l) To borrow money from any source and pledge or assign chattels or future tribal income as security therefor, subject to the review and approval of the Secretary of the Interior.

(m) To provide by ordinance for the assignment, use or transfer of tribal lands within the reservation.

(n) To enact ordinances subject to review and approval by the Secretary of the Interior covering the granting of both surface and subsurface leases for such periods as are permitted by law.

(o) To levy and collect taxes and to impose license fees, subject to review and approval by the Secretary of the Interior, upon members and non-members doing business within the reservation.

...

(q) To enact ordinances, subject to review and approval by the Secretary of the Interior, establishing and governing tribal courts and law enforcement among Indians on the reservation, regulating domestic relations of members of the tribe, but all marriages and divorces shall be in accordance with state laws, providing for appointment of guardians for minors and mental incompetents, regulating the inheritance of non-restricted real and personal property of members of the tribe within the reservation, and providing for the removal or exclusion from the reservation of any non-member of the tribe whose presence may be injurious to the people of the reservation.

(r) To enact ordinances governing the activities of voluntary associations consisting of members of the tribe organized for purposes of cooperation or other purposes.

(s) To regulate its own procedures, to appoint subordinate committees, boards, advisory or otherwise, tribal officials and employees not otherwise provided for in this Constitution and Bylaws and to regulate subordinate organizations for economic and other purposes.

(t) The Tribal Council of the White Mountain Apache Tribe may exercise such further powers as may be delegated to the Council by members of the tribe or by the Secretary of the Interior, or any other duly authorized official or agency of the State or Federal Government.

(u) The foregoing enumeration of powers shall not be construed to limit the powers of the White Mountain Apache Tribe.

13. Ariz. Rev. Stat. Ann. § 28-1551 (1985 Supp.)

Definitions

In this article, unless the context otherwise requires:

...

3. "Fuel tank" means any receptacle on a motor vehicle from which fuel is supplied for the propulsion of the vehicle, exclusive of a cargo tank. A fuel tank includes a separate compartment of a cargo tank used as a fuel tank and any auxiliary tank or receptacle of any kind from which fuel is supplied for the propulsion of the vehicle, whether or not such tank or receptacle is directly connected to the fuel supply line of the vehicle.

4. "Highway" means any way or place in this state of whatever nature, open to the use of the public, for purposes of traffic, including highways under construction.

5. "In this state" means within the exterior limits of the state of Arizona and includes all territory within these limits owned by or ceded to the United States of America.

6. "License" means use fuel tax license.

7. "Motor vehicle" means any self-propelled vehicle required to be licensed or subject to licensing for operation upon the highways.

8. "Person" means any individual, firm, partnership, joint venture, association, corporation, estate, trust, business trust, receiver, syndicate, this state, any county, municipality, district or other subdivision thereof, or any other group or combination acting as a unit.

9. "Sell" includes any transfer of title or possession, exchange or barter, in any manner or by any means whatsoever.

10. "Use" includes the placing of fuel into any receptacle on a motor vehicle from which fuel is supplied for the propulsion of the vehicle unless the operator of the vehicle establishes to the satisfaction of the director that the fuel was consumed for a purpose other than to propel a motor vehicle on the highways of this state and, with respect to fuel brought into this state in any such receptacle, the consumption of the fuel in this state. A person placing fuel in a receptacle on a motor vehicle of another who holds a valid use fuel tax is not deemed to have used the fuel.

11. "Use fuel" includes all gases and liquids used or suitable for use to propel motor vehicles, except such fuels as are subject to the tax imposed by article 1 of this chapter.¹

12. "User" includes any person who, within the meaning of the term "use" as defined in this article, uses fuel.

14. **Former Ariz. Rev. Stat. Ann. § 28-1552 (1979 Supp.)**
Imposition of Tax

For the purpose of partially compensating the state for the use of its highways, an excise tax is imposed at the rate of eight cents per gallon upon use fuel used in the propulsion of a motor vehicle on any highway within this state, such tax to be collected and remitted to this state or paid to this state as follows:

1. By a vendor, measured by the volume of use fuel:

(a) Delivered by the vendor into the fuel tank of a motor vehicle not operated by the vendor, or

(b) Used by the vendor on the highways of this state in the propulsion of a motor vehicle operated by the vendor.

2. By a user, measured by the volume of use fuel imported into this state or acquired without payment of tax to a vendor within this state, and used in the propulsion of a motor vehicle on the highways of this state.

3. The tax, with respect to fuel acquired by any fuel user in any manner other than delivery by a vendor into a fuel tank of a motor vehicle, shall attach at the time of the consumption of such fuel in the propulsion of a motor vehicle upon the highways of this state, and shall be paid over to the director by the fuel user with the report required and in accord with other applicable provisions of this article.

15. **Former Ariz. Rev. Stat. Ann § 28-1556 (1979 Supp.)**
Presumption of use

A. For the proper administration of this article, and to prevent evasion of the excise tax, it shall be presumed, until the contrary is established by competent proof under rules and procedures the director adopts, that all use fuel received into any receptacle on a motor vehicle from which fuel is

supplied to propel such vehicle, is consumed in propelling the vehicle on the highways of this state.

16. Former Ariz. Rev. Stat. Ann. § 40-601 (1974)

Definitions

A. In articles 1 and 2 of this chapter, unless the context otherwise requires:

...

7. "Contract motor carrier of property" means any person engaged in the transportation by motor vehicle of property, for compensation, on any public highway, and not included in the term common motor carrier of property, and, for the purpose of taxation, the owner of any motor vehicle in excess of six thousand pounds unladen weight who leases, licenses or by any other arrangement permits the use of such vehicle by any other, other than a common or contract carrier subject to tax under articles 1 and 2 of this chapter, for the transportation of property upon the public highway for compensation or in the furtherance of any commercial or industrial enterprise.

8. "Motor carrier" means any common motor carrier of property or passengers, or any contract motor carrier of property or passengers.

9. "Motor vehicle" means any automobile, truck, truck tractor, trailer, semi-trailer, motor bus or any self-propelled or motor driven vehicle used upon any public highway of this state for the purpose of transporting persons or property,² except farm tractors, implements of husbandry and other vehicles designed primarily for or used in agricultural operations and only incidentally operated or moved upon a highway, which shall be exempt from the provisions of this chapter.

10. "Private motor carrier" means any person not included in the term "common motor carrier" or "contract motor carrier" who transports by any motor vehicle in excess of six thousand pounds unladen weight property of which such person is the owner, lessee or bailee, when such transportation is for the purpose of sale, lease, rent or bailment, or in the furtherance of any commercial enterprise,

but ownership of the property transported shall not be accepted as sufficient proof of a private motor carrier operation if the carrier is in fact engaged in the transportation of property for hire, compensation or remuneration, or if such transportation operations are conducted for profit and not merely as an incident to a commercial enterprise, provided that towing of disabled vehicles by tow trucks operated in connection with an automobile repair or service business or a wrecking yard shall be deemed to be incidental to a commercial enterprise, and the operator thereof shall be deemed to be a private motor carrier when engaged in such operations, and provided that transporting of pulpwood logs which are consumed in the manufacture of pulp or paper within the state of Arizona by a person in the business of harvesting such pulpwood logs shall be deemed to be incidental to a commercial enterprise and a pulpwood harvester transporting such pulpwood logs shall be deemed to be a private motor carrier when so engaged. For purposes of this paragraph "pulpwood logs" means logs which are used or intended for use as a raw material in the manufacture of pulp or paper.

11. "Public highway" means any public street, alley, road, highway or thoroughfare of any kind used by the public, or open to the use of the public as a matter of right for the purpose of vehicular travel.

12. "Superintendent" means the superintendent of the motor vehicle division of the department of transportation.

17. **Former Ariz. Rev. Stat. Ann. § 40-641 (1979 Supp.)**

License tax upon motor carriers; collection; disposition

A. In addition to all other taxes and fees:

1. Every common motor carrier of property and every contract motor carrier of property shall pay to the state, on or before the twenty-fifth day of each month, a license tax of two and one-half per cent of the gross receipts from the carrier's operations within the state for the preceding calendar month, excluding receipts from property transported under a star route contract with the federal government. The gross receipts from the operation for hire by a common motor car-

rier of property or a contract motor carrier of property of a farm tractor or implements of husbandry exempt from registration, whether incidental to the operations as such motor carrier or otherwise, shall not be subject to the tax imposed by, or other provisions of, this article.

2. Every common motor carrier of passengers and every contract motor carrier of passengers shall pay to the state, on or before the twenty-fifth day of each month, a license tax of two and one-quarter per cent of the gross receipts from his operations within the state for the preceding calendar month. The gross receipts from operation of public service corporations providing urban mass transportation service within urban areas and public transportation systems or services provided by counties, cities and towns or their contractors as authorized by chapter 6, article 5 of this title shall not be subject to the tax imposed by, or other provisions of, this article. The only gross receipts of a public service corporation providing urban mass transportation service within urban areas that shall not be subject to the tax imposed by this article shall be those gross receipts obtained from providing passenger urban mass transportation within the urban area.

B. When any carrier operates partly within and partly without the state, the gross receipts of the carrier within the state shall be deemed to be all receipts of business beginning and ending within the state, and a proportion based upon the proportion of the mileage within the state to the entire mileage over which business is done, of receipts on all business passing through, into or out of the state.

C. Upon receipt of the taxes the department of transportation shall forthwith transmit them to the state treasurer, who shall credit them to the Arizona highway user revenue fund.

2
No. 86-814

UNITED STATES SUPREME COURT

October Term, 1986

Supreme Court, U.S.
FILED

DEC 20 1986

JOSEPH F. SPANIOL, JR.
CLERK

WHITE MOUNTAIN APACHE TRIBE, et al.,
Petitioners,

v.

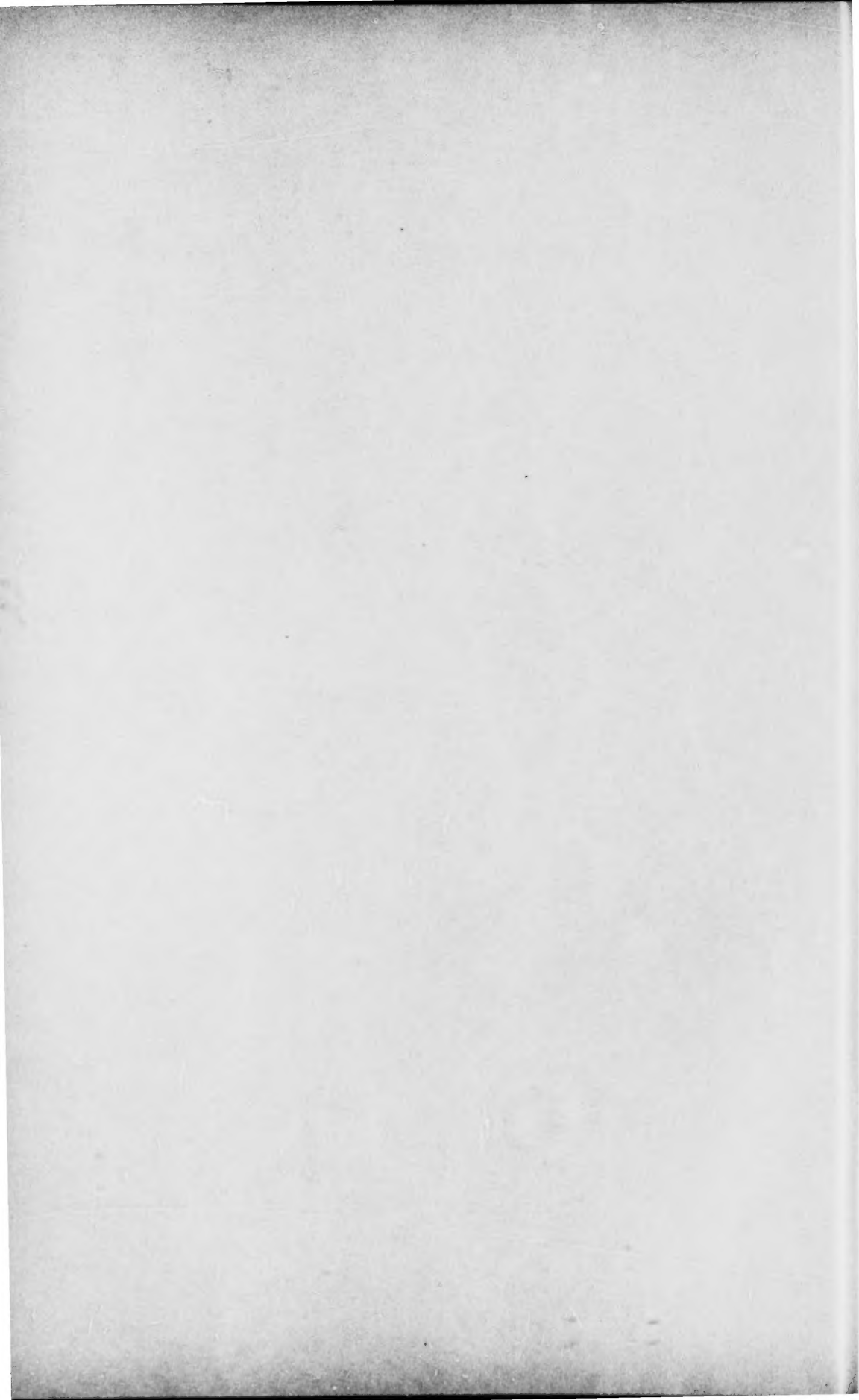
BRUCE E. BABBITT, et al.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

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Attorney General
State of Arizona

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7/1/88



QUESTION PRESENTED

Respondents submit that there is only one question presented by the decision of the Court of Appeals, i.e.:

IS A CONGRESSIONAL ENACTMENT, ENACTED UNDER THE COMMERCE CLAUSE WHICH, BY VIRTUE OF THE SUPREMACY CLAUSE, PRE-EMPTS CERTAIN STATE TAXING STATUTES, A "LAW" WHICH IS INCORPORATED IN THE CIVIL RIGHTS ACT, 42 U.S.C. § 1983?

LIST OF PARTIES

The parties to the proceedings below were the White Mountain Apache Tribe; Basin Building Materials Co. and E.H. Loveness Lumber Sales Co., Oregon corporations doing business as "Pinetop Logging Company;" the State of Arizona; Arizona Department of Transportation; Bruce E. Babbitt, Governor of the State of Arizona; Arthur Atonna, Chairman, Arizona State Transportation Board; Andrew Federhar, Vice-Chairman, Arizona State Transportation Board; Hal Butler, Ted Valdez, Jim Patterson and Hank Geitz, members, Arizona State Transportation Board; Charles Miller, Director, Arizona Department of Transportation; and Juan Martin, Assistant Director, Arizona Department of Transportation, Motor Vehicles Division.

Pinetop Logging Company has no parent, affiliate, or subsidiary corporations to be listed under Rule 28.1

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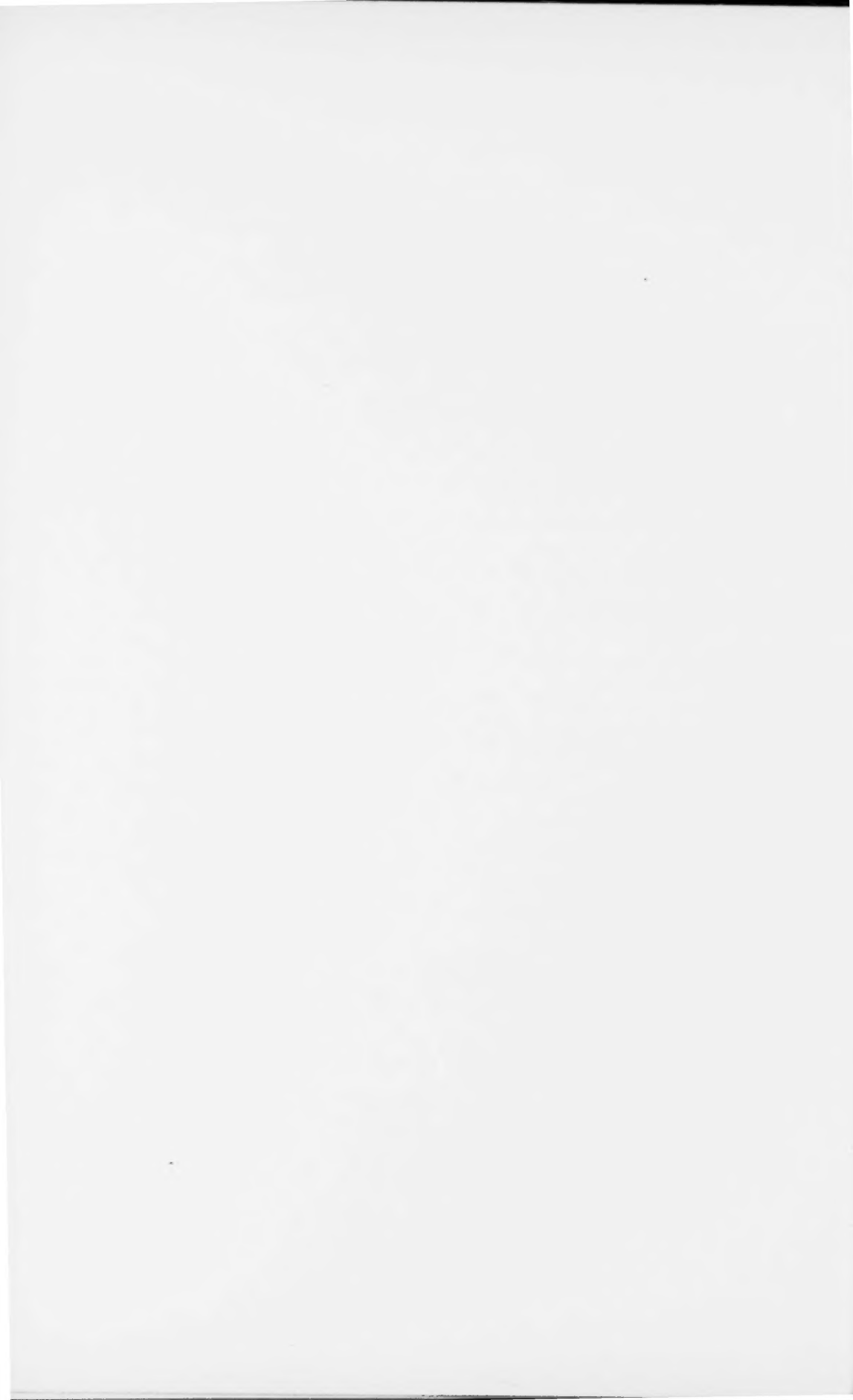


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OPINIONS BELOW

The relevant opinion of the Court of Appeals for the Ninth Circuit is reported at 798 F.2d 1205 (9th Cir. 1986) and is reproduced in the petitioners' appendix at pp. A-1 through A-9.

The District Court's decision was unreported and is reproduced in the petitioners' appendix at pp. A-125 through A-128.



JURISDICTION

This Court has jurisdiction to review the decision of the Court of Appeals under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes involved are 25 U.S.C. §§ 196, 406, 407 and 466 relating to the harvesting of timber on Indian reservations, and 42 U.S.C. §§ 1983 and 1988 relating to civil rights and civil rights attorney's fees.

The state taxing statutes are Arizona Revised Statutes (A.R.S.) § 28-1551 (1985 Supp.), former A.R.S. § 28-1552 (1979 Supp.), former A.R.S. § 28-1556 (1979 Supp.), former A.R.S. § 40-601 (1964), and former A.R.S. § 40-641 (1979 Supp.).



STATEMENT OF THE CASE

This case has its origin in an earlier decision of this Court, White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980). In Bracker, this Court reversed a decision of the Arizona Court of Appeals concerning Arizona's motor vehicle license and fuel taxes assessed against a non-Indian logging company for hauling timber pursuant to a contract with the Indian tribe. In Bracker this Court held that, since the federal government has undertaken comprehensive regulation of the harvesting and sale of tribal timber, the state taxes are preempted by the federal laws. Id. at 152, n. 15.

Upon reversal and remand of Bracker to the Arizona courts, petitioners chose to apply for attorney's fees not in the state court, but in the federal district court which had previously abstained. They argued, for the first time, that



their lawsuit was grounded on 42 U.S.C. § 1983 and that therefore they were entitled to attorney's fees under 42 U.S.C. § 1988. The State objected to the attorney's fees application on several grounds, all of which were rejected by the district court. In particular, the district court overruled the State's objection that the district court lacked jurisdiction under the doctrine of England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1963), and also the State's argument that petitioners' claim did not fall within 42 U.S.C. § 1983.

The Court of Appeals reversed the district court. Its latest opinion, which superseded and corrected its prior opinions, held that the preemption claim underlying this Court's decision in Bracker does not give rise to a claim cognizable under 42 U.S.C. § 1983. The Court of Appeals did not decide the England challenge,

nor the question of whether an Indian tribe has standing to seek a fee award under § 1988 because it is not a "citizen" or "person" within the meaning of § 1983.^{1/}

The Court of Appeals also rejected petitioner's argument that, under Maher v. Gagne, 448 U.S. 122 (1980), attorney's fees under 42 U.S.C. § 1988 may be awarded.

REASONS FOR DENYING THE WRIT

- I. THE COURT OF APPEALS' DECISION CORRECTLY FOLLOWS PRECEDENTS OF THIS COURT. IT IS IN ACCORDANCE WITH ALL FEDERAL COURT DECISIONS ON THIS POINT.

The Court of Appeals' decision is correct. Its decision that a preemption claim under the Supremacy Clause does not support a claim under 42 U.S.C. § 1983 is consistent with long-established precedents of this Court. In Swift & Company v. Wickham, 382 U.S. 111 (1965), this

1. White Mountain Apache Tribe v. Williams, 798 F.2d 1205, 1216, n. 14.



Court held that a claim that New York's labeling laws were in conflict with the federal Poultry Products Inspection Act of 1957 and was therefore invalid under the Supremacy Clause is not a "constitutional" claim so as to require a three-judge court under former 28 U.S.C. § 2281. This Court explained: "The basic question involved in these [preemption] cases, however, is never one of interpretation of the Federal Constitution but inevitably one of comparing two statutes [state and federal]." 382 U.S. at 120. The case of Ex Parte Bransford, 310 U.S. 354 (1940), cited by this Court in Swift & Company, is particularly illuminating, since it concerns the preemption of a state tax by federal banking laws:

If such assessments are invalid, it is because they levy taxes upon property withdrawn from taxation by federal law or in a manner forbidden by the National Banking Act. The declaration of the supremacy clause gives superiority to valid



federal acts over conflicting state statutes but this superiority for present purposes involves merely the construction of an act of Congress, not the constitutionality of the state enactment.
310 U.S. at 358-359.

Relying on the Swift & Company decision, this Court, in Chapman v. Houston Welfare Rights Organization, 441¹ U.S. 600 (1979), held that a claim of preemption of state law by federal social security laws is not a claim within the jurisdictional requisites of 28 U.S.C. § 1343(3). Chapman, therefore, stands for the proposition that the Supremacy Clause only establishes federal-state priorities and does not create individual rights, nor does it "secure" such rights within the meaning of 28 U.S.C. § 1343(3):

We must conclude that an allegation of uncompatibility between federal and state statutes and regulations does not, in itself, give rise to a claim "secured by the Constitution" within the meaning of § 1343(3).
Id. at 615.



The Court of Appeals' opinion is also faithful to the doctrines laid down recently by this Court in Pennhurst State School & Hospital v. Haldeman, 451 U.S. 1 (1981), and Middlesex County Sewerage Authority v. National Sea Clammers Association, 453 U.S. 1 (1981). In these two cases, this Court held that not all federal laws secure rights within the meaning of 42 U.S.C. § 1983. Instead, federal laws come within the meaning of § 1983 only if they specifically create "enforceable" rights" under § 1983. The Court of Appeals correctly found, based on Bracker, that in this case the federal comprehensive scheme of timber harvesting on Indian reservations did not create "enforceable" rights under § 1983. Rather, it simply preempted the state taxing scheme in question, and, since there was no direct conflict between the state and federal laws, those federal laws did not come within the

meaning of § 1983.^{2/}

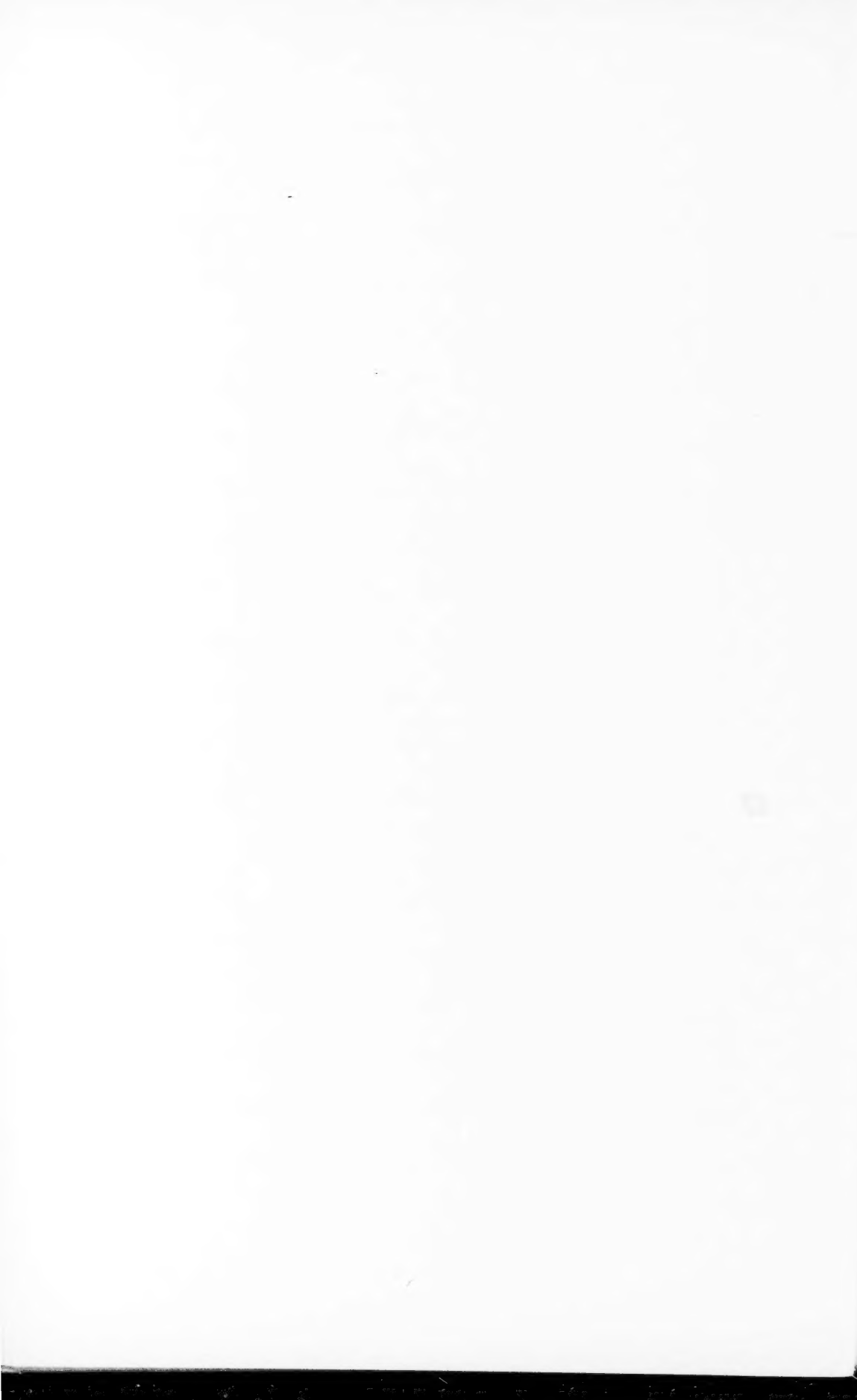
Maine v. Thiboutot, 448 U.S. 1 (1980), can be easily distinguished. In Maine, the welfare recipient's claim was grounded on the federal Social Security Act, which entitled the recipient to certain benefits. State rules directly violated the recipient's statutory entitlement. There, the recipient's rights to welfare benefits were clearly "secured" by the federal social security laws.^{3/} The

2. Contrary to petitioners' assertion, the Court of Appeals' decision did not conclude that all Supremacy Clause claims are beyond the purview of § 1983. It specifically said that "we need not reach the question whether a Supremacy Clause claim might give rise to a § 1983 action where preemption was based on such actual conflict." White Mountain Apache Tribe v. Williams, 798 F.2d 1205, 1211, n. 7.
3. The case of Coos Bay Care Center v. Oregon, ___ F.2d ___ (9th Cir. No. 85-4049, Nov. 3, 1986), cited by the petitioner, is not in conflict with this case. The Coos Bay case dealt with another entitlement program, the federal Social Security Act, Title XIX, the Medicaid provision.



federal timber harvesting laws, on the other hand, create no entitlement, nor do they secure rights in any individual.

The Ninth Circuit Court of Appeals decision is also consistent with all other circuits which have recently passed on this issue. In addition to Consolidated Freightways v. Kassel, 730 F.2d 1139 (8th Cir. 1984), cert. denied, 105 S.Ct. 126 (1984), which holds that a Commerce Clause claim does not come within the meaning of 42 U.S.C. § 1983, the Seventh, Tenth and Eleventh Circuit Courts of Appeal have all decided that federal preemption claims do not come within the meaning of § 1983. Gould, Inc. v. Wisconsin, 750 F.2d 608 (7th Cir. 1984), affirmed on other grounds, ___ U.S. ___, 106 S.Ct. 1057 (1986) (claim of preemption of state labor laws by the federal National Labor Relations Act does not come within § 1983 so as to authorize § 1988 attorney's fees); J & J Anderson



v. Town of Erie, 767 F.2d 1469 (10th Cir. 1985) (claim of preemption of town ordinance by Federal Aviation Act does not come under § 1983). Pirollo v. City of Clearwater, 711 F.2d 1006, rehearing denied, 720 F.2d 688 (11th Cir. 1983) (preemption of city ordinance by Federal Aviation Act does not come within § 1983).

A number of district courts have come to the same conclusion. Yakima Indian Nation v. Whiteside, 617 F.Supp. 735 (E.D. Wash. 1985) (federal preemption claim asserted by the Indian tribe does not come within the meaning of § 1983); Pesticide Public Policy Foundation v. Village of Wauconda, 622 F.Supp. 423 (N.D. Ill. 1985) (alleged conflict between village ordinance and Federal Fungicide and Rodenticide Act does not come within § 1983); United Nuclear Corp. v. Cannon, 564 F.Supp. 581 (D.R.I. 1983) (preemption of state law by the Federal Atomic Energy Act does



not fall within § 1983); New York Airlines, Inc. v. Dukes County, 623 F.Supp. 1435 (D.Mass. 1985) (preemption of county ordinance by the Federal Aviation Act does not come within § 1983).

II. THERE IS NO CONFLICT BETWEEN THE COURT OF APPEALS' OPINION AND STATE COURT DECISIONS.

In addition to the four circuit courts of appeal and the four district court decisions cited, supra, the New Hampshire Supreme Court concluded that a Supremacy Clause challenge does not implicate § 1983. Private Truck Council v. New Hampshire, No. 86-088 (N.H. Aug. 12, 1986).

Arrayed against this overwhelming weight of authority are the two state court decisions cited by the petitioners to be conflict with the Ninth Court of Appeals' decision here. They can be easily distinguished. The Arizona Court of Appeals' decision in Central Machinery Co.

v. Arizona^{4/} was vacated by the Arizona Supreme Court on December 12, 1986 (No. 18493-PR). See Appendix. That opinion follows the Court of Appeals' decision here.

The New Mexico decision, Ramah Navajo School Board, Inc. v. Bureau of Revenue, 104 N.M. 302, 720 P.2d 1243 (Ct.App. 1986),

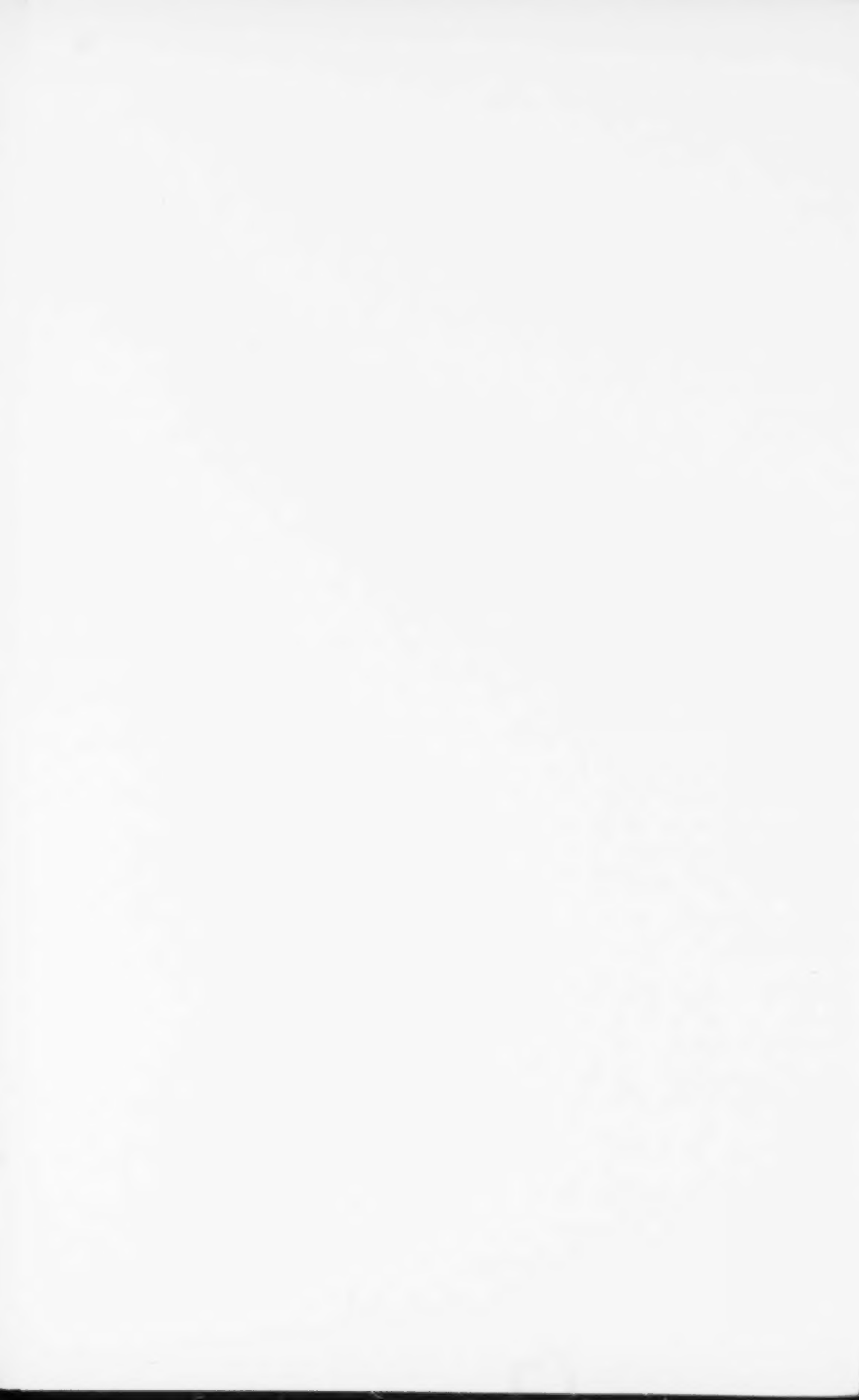
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4. Respondents disagree with petitioners' assertion that this case is a better case than Central Machinery for this Court's review inasmuch as Justice O'Connor may recuse herself since she was the trial judge in Central Machinery. Respondents submit that the question of whether a Justice may recuse himself/herself is conjectural at this stage. However, respondents wish to point out that, at the evidentiary hearing on attorney's fees in this case in early 1981, Philip Von Ammon, of the law firm of Fennomore, Craig, Von Ammon & Udall (with which Justice O'Connor's husband was a law partner), was the State's expert witness on both the legal propriety of attorney's fees and the reasonableness of petitioners' fee application. Additionally, the controversy in this case began in 1968 (petitioners' statement of the case at p. 3 of the petition), when Justice O'Connor was representing the State of Arizona as an Assistant Attorney General. These facts may also result in Justice O'Connor's recusal.



is not in conflict with the Court of Appeals' decision here. The New Mexico court agrees that the Supremacy Clause does not create § 1983 rights. 720 P.2d at 1252, 1255. It found, however, that the Indian Self-Determination and Educational Assistance Act granted to the Indians the right to education, and that the New Mexico law, in taxing the building of the school, violated that right. Regardless of the merits of the New Mexico appellate decision in Ramah, the timber harvesting law involved in this case, unlike laws concerning education of children, plainly does not create any rights remotely resembling the right to education.

III. PETITIONERS' EQUAL PROTECTION AND DUE PROCESS CLAIMS WERE INSUBSTANTIAL AND WERE ABANDONED BY THEM AFTER THE DISTRICT COURT'S ABSTENTION ORDER.

Petitioners' Argument III, concerning their equal protection and due process



claims, deserves a brief response. Contrary to Judge Fletcher's surmise in her dissent, the petitioners did allege their equal protection and due process claims in the state court complaint after the abstention order by the district court. This fact was admitted by the petitioners in their brief before the Court of Appeals. This error was belatedly brought to the Court of Appeals' attention. See Appendix.^{5/} After alleging them in the complaint, the petitioners later abandoned them by failing to argue these claims either in the Arizona appellate courts or

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5. Petitioners' silence and failure to properly advise the Court of Appeals and this Court as to this factual mistake suggest a lack of candor which should operate against them as to this issue. Moreover, the reference in the quoted portion of their brief that the petitioners preserved their § 1988 claims by not submitting them is somewhat disingenuous because, at the time of the abstention order in early 1974, § 1988's attorney's fees provision did not exist (it was added by Congress in 1976).



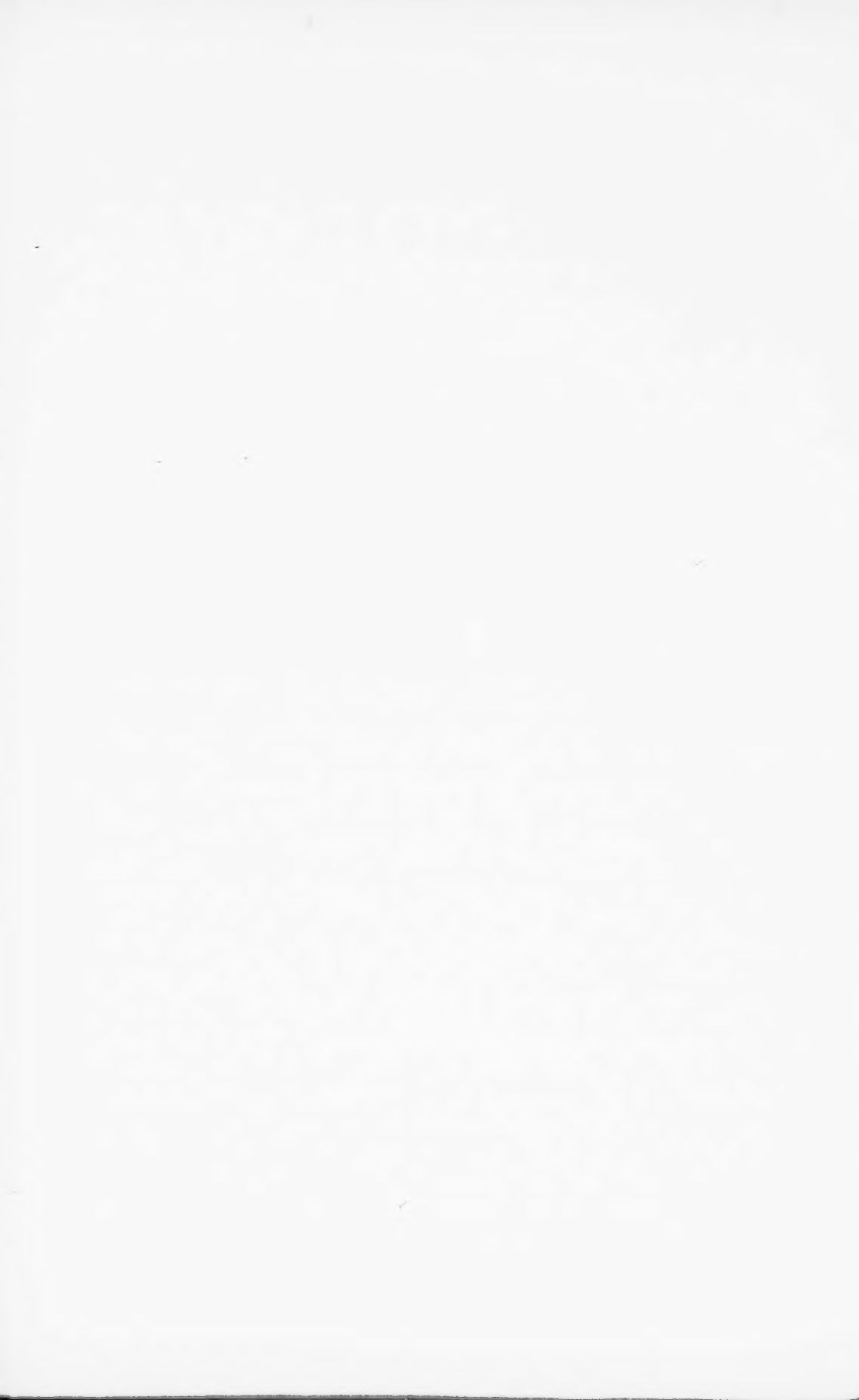
in this Court in Bracker. Having abandoned these claims, the petitioners cannot now argue that they support their claim for attorney's fees under 42 U.S.C. § 1988.

IV. ARIZONA HAS NEVER ARGUED "VOLUNTARY CESSATION" AND THERE IS NO REASON WHATEVER FOR THE DISTRICT COURT TO ENTER JUDGMENT AFTER BRACKER'S REMAND TO THE STATE COURTS.

Petitioners' last argument, as to Arizona's "voluntary cessation," is totally frivolous. This Court's decision in Bracker and its remand to the state court for final judgment was the final word on the state taxation issue. The entry of another judgment by the abstaining district court serves no purpose whatsoever. Arizona's compliance with the Bracker decision is not "voluntary cessation."

CONCLUSION

Petitioners' suggestion that the decision on this case can be held in abey-



ance until this Court's consideration on the merits in Wright v. City of Roanoke Redevelopment and Housing Authority, No. 86-5919, is unwarranted. Although Wright is a § 1988 attorney's fees case, it does not implicate a preemption claim under the Supremacy Clause. The Wright decision in the Court of Appeals, 771 F.2d 833 (4th Cir. 1985), simply held that the Federal Housing Act did not create a private cause of action and therefore did not create "enforceable" rights under § 1983. Determination of this issue in Wright would not in any way affect the outcome reached by the Ninth Circuit Court of Appeals in this case.

The Court of Appeals' decision is correct. It follows all controlling decisions of this Court. It is consistent with all other federal circuit and district court decisions on the issue of whether preemption claims under the Suprem-



acy Clause come within the meaning of
§ 1983. The petition for certiorari should
be denied.

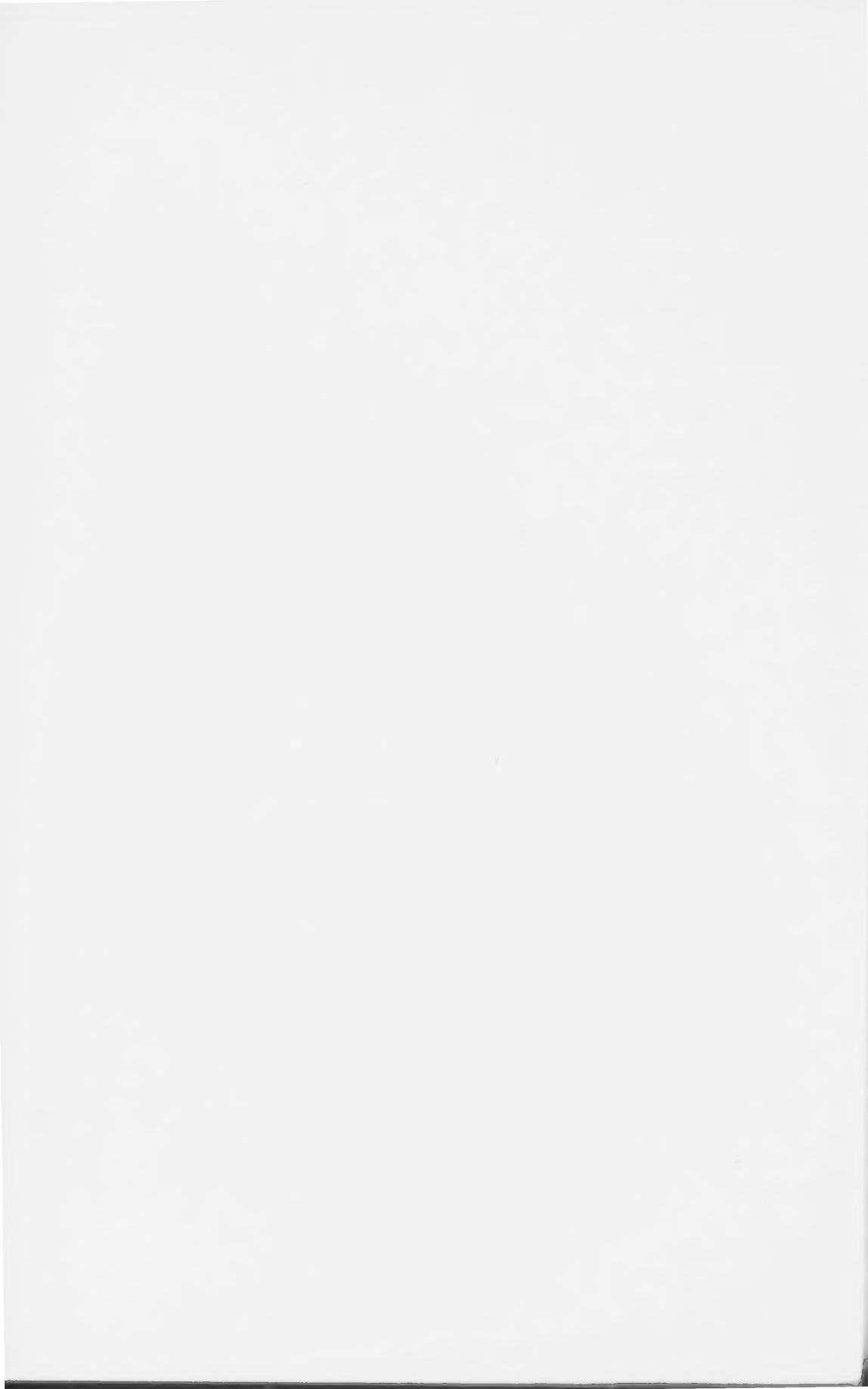
Respectfully submitted,

ROBERT K. CORBIN
Attorney General

ANTHONY B. CHING
Solicitor General



A P P E N D I X



August 22, 1986

The Clerk
United States Court of Appeals
for the Ninth Circuit
P. O. Box 547
San Francisco, California 94101

Re: White Mountain Apache Tribe v.
Williams
Ninth Circuit No. 81-5348

Dear Sir/Madam:

Please bring this letter to the attention of the panel, Judge Norris, Judge Fletcher and District Judge James M. Burns.

Counsel for the appellants wishes to point out a mistake of fact in the Court's opinion (at p. 20 and note 11 of p. 20) and in the dissent (at p. 4). At both places the majority opinion and the dissenting opinion assumed that the Tribe did not tender or submit its equal protection and due process claims to the state court after the abstention order. The opposite is true. It is undisputed that the

Tribe, after the district court's abstention order, did tender and submit its equal protection and due process claims to the state court, along with their preemption claim.

Plaintiffs' answering brief, at p. 7, stated that:

"Thereafter, the White Mountain Apache Tribe joined in February, 1974 as an additional plaintiff in the state court refund suit previously filed by Pinetop. The amended complaint (which was verbatim identical to the complaint previously filed in the federal action) joined

Plaintiffs' answering brief, at p. 21, note 9, also stated:

"The other major holding of England is that the plaintiff in an abstained case may preserve his right to original federal court decision on the merits of his federal claims That was not done in this case with respect to the substantive federal claims (though the plaintiffs did preserve their § 1988 attorneys' fees rights for federal decision by not submitting them to the state courts . . .)."

Counsel for the appellants believes that this factual mistake does not affect the outcome of this case in any way, and therefore did not cross-move for rehearing. Had the court requested a response to appelllles' motion for rehearing, this fact would have been brought to this Court's attention earlier.

Very truly yours,

ANTHONY B. CHING
Solicitor General
Attorney for Appellants

ABC:ca

cc: Neil V. Wake, Esq.
BEUS, GILBERT, WAKE & MORRILL
3300 North Central, Suite 1000
Phoenix, AZ 85012-2506
Attorneys for Appelles



IN THE SUPREME COURT
OF THE STATE OF ARIZONA
En Banc

CENTRAL MACHINERY)	
COMPANY, an Arizona)	
corporation,)	Supreme Court
)	No. 18493-PR
Plaintiff-Appellee,)	
)	Court of Appeals
v.)	No. 1 CA-CIV 7779
)	
STATE OF ARIZONA,)	Maricopa County
)	Superior Court
Defendant-Appellant.)	No. C-297870
)	
)	

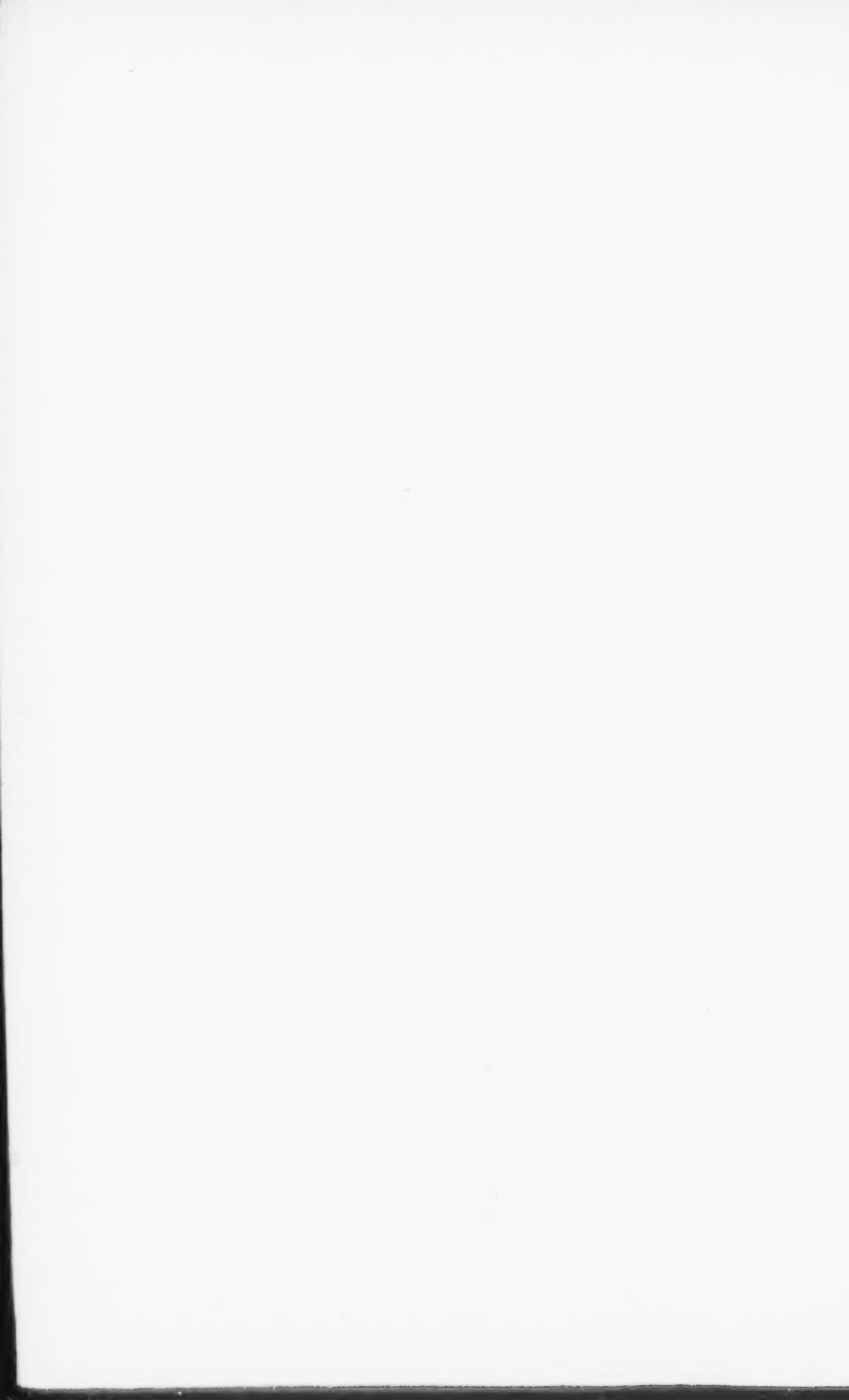
Appeal from the Superior Court
of Maricopa County

The Honorable William T. Moroney, Judge

MOTION FOR ATTORNEY'S FEES DISMISSED

HAYS, Justice

The state petitioned this court to review an opinion of the court of appeals that upheld the trial court's award of attorney's fees under 42 U.S.C. § 1988 in favor of Central Machinery Company. We granted review and have jurisdiction pursuant to Ariz. Const. art. 6, § 5(3), A.R.S.



§ 12-120.24 and Rule 23, Ariz.R.Civ.P. 17A
A.R.S.

We granted review of the following two issues: (1) whether the court of appeals, by finding that Gila River Farms would bear legal fees throughout the litigation and that any recovery of fees by Central Machinery would be transmitted to Gila River Farms, improperly conferred standing on Central Machinery to bring a cause of action under 42 U.S.C. § 1983; (2) whether the original tax refund claim in state court is a claim within federal Civil Rights Act of 1871, 42 U.S.C. § 1983, and thereby support an award of attorney's fees pursuant to 42 U.S.C. § 1988.

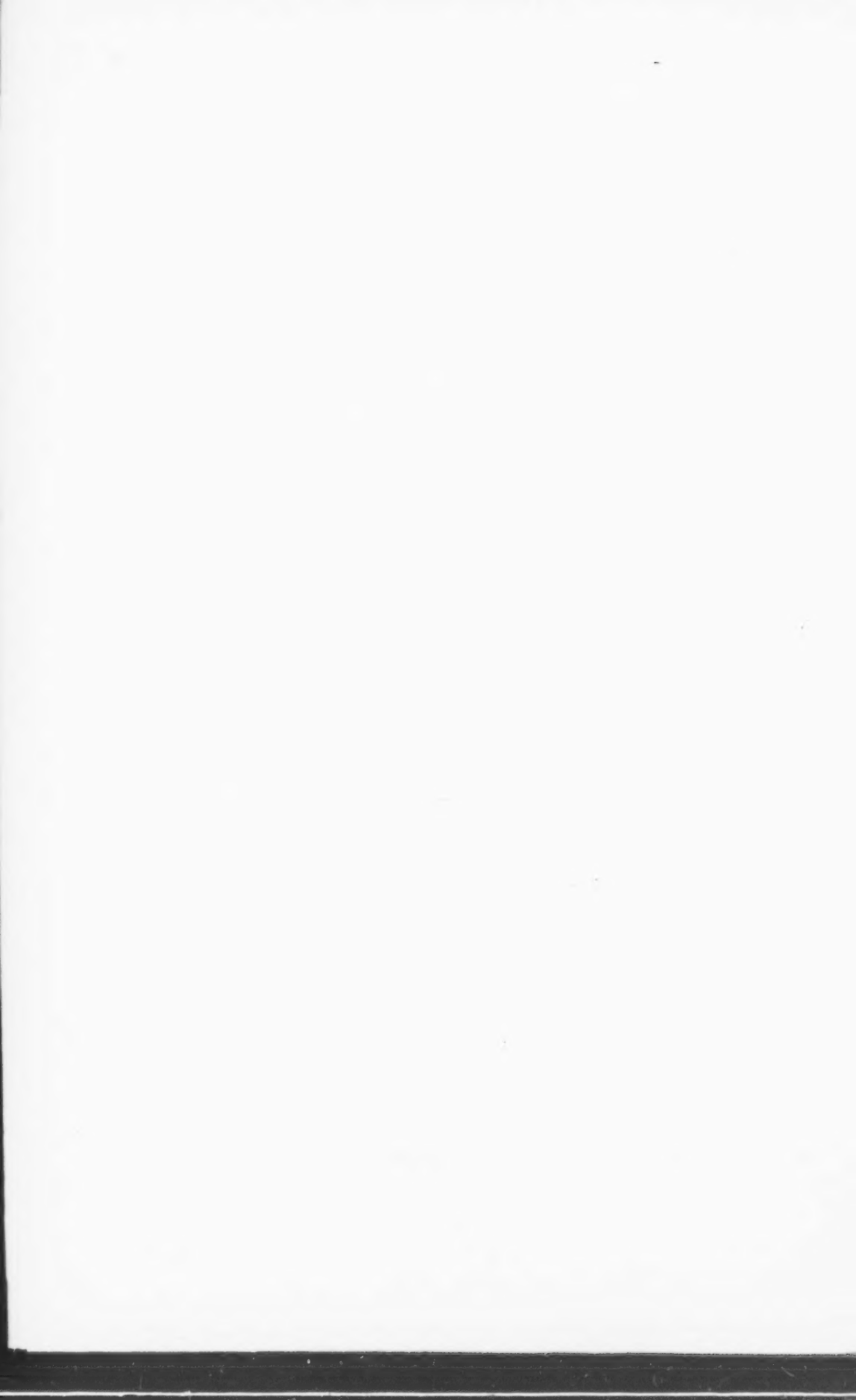
This litigation has a long history. In 1974, Central Machinery Company sold a number of tractors to Gila River Farms, an enterprise of the Gila River Indian Community. Arizona state sales tax of \$2,916.62 was included in the price. Gila River



Farms paid the invoice amount with the understanding that if Central Machinery was not liable for the tax, the company would refund any amount it recovered from the state to Gila River Farms.

Central Machinery paid the tax under protest and, after exhausting administrative remedies, filed an action in superior court to recover the tax. See A.R.S. § 42-1339(B).¹ The trial court ruled that Central Machinery was not liable for the tax. The state appealed. This court reversed. *State v. Central Machinery Co.*, 121 Ariz. 183, 589 P.2d 426 (1978). Central Machinery subsequently appealed the decision to the United States Supreme Court. The Court held that the Indian trader statutes, 25 U.S.C. §§ 261-264, preempted Arizona's imposition of state sales

¹ Repealed by laws 1985, ch. 366, § 31 (eff. July 1, 1986). See, now, A.R.S. § 42-124.



tax on the transaction.² Central Machin-

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§ 261. Power to appoint traders with Indians

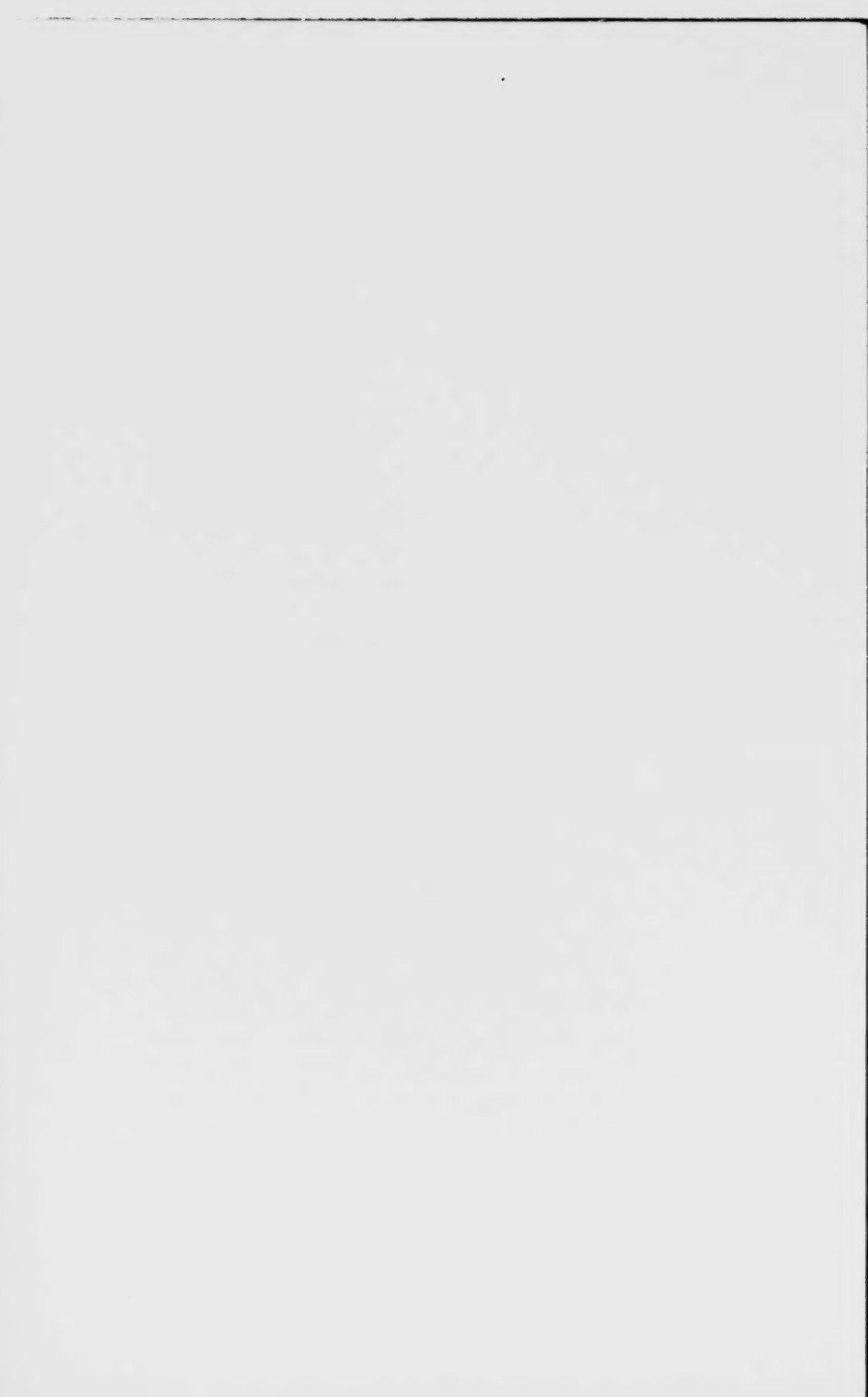
The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians.

§ 262. Persons permitted to trade with Indians

Any person desiring to trade with the Indians on any Indian reservation shall, upon establishing the fact to the satisfaction of the Commissioner of Indian Affairs, that he is a proper person to engage in such trade, be permitted to do so under such rules and regulations as the Commissioner of Indian Affairs may prescribe for the protection of said Indians.

§ 263. Prohibition of trade by President

The President is authorized, whenever in his opinion the public interest may require the same, to prohibit the introduction of goods, or of any particular article, into the country belonging to any Indian tribe, and to direct all licenses to trade with such tribe to be revoked, and all applications therefor to be rejected. No trader to any other tribe shall, so long as such prohibition may continue, trade with any Indians of or for the tribe against which such prohibition is issued.



ery Co. v. Arizona State Tax Comm'n, 448
U.S. 160, 165-66, 100 S.Ct. 2592, 2596
(1980).

On remand, Central Machinery sought
attorney's fees based on the Civil Rights
Attorney's Fees Awards Act of 1976, 42
U.S.C. § 1988. The trial court awarded
attorney's fees under this statute in the

2 (continued)

§ 264. Trading without license; white
persons as clerks

Any person other than an Indian of the
full blood who shall attempt to reside in
the Indian country, or on any Indian reser-
vation, as a trader, or to introduce goods,
or to trade therein, without such license,
shall forfeit all merchandise offered for
sale to the Indians or found in his posses-
sion, and shall moreover be liable to a
penalty of \$500. Provided, That this sec-
tion shall not apply to any person residing
among or trading with the Choctaws, Chero-
kees, Chickasaws, Creeks, or Seminoles,
commonly called the Five Civilized Tribes,
residing in said Indian country, and be-
longing to the Union Agency therein: And
provided further, That no white person
shall be employed as a clerk by any Indian
trader, except such as trade with said Five
Civilized Tribes, unless first licensed so
to do by the Commissioner of Indian Af-
fairs, under and in conformity to regula-
tions to be established by the Secretary
of the Interior.

amount of \$53,165 and the Arizona Court of Appeals affirmed the award. Central Machinery Co. v. Arizona, ___ Ariz. ___, ___ P.2d ___ [1 CA-CIV 7779, filed June 27, 1985]. The state petitioned this court. We reverse.

The state has raised several challenges to the decision below. First, the state contends that Central Machinery has no standing to bring a cause of action under § 1983. Second, even if standing was properly recognized, the state asserts that the Indian trader statutes do not support a claim cognizable under § 1983. The state claims that not only do the Indian trader statutes not create any "enforceable rights" in favor of either Central Machinery or the Indian tribe, but the trader statutes also contain exclusive remedies that preempt any § 1983 action. Finally, the state argues that, based on the facts of this case, neither the supremacy clause



nor the commerce clause provides a constitutional basis for a § 1983 cause of action.

I. STANDING

The state contends that Central Machinery is without standing because no agreement exists between Central Machinery and Gila River Farms whereby any attorney fees recovered under § 1988 would be paid back to Gila River Farms. The trial court, however, determined that such an agreement existed. On review, the court of appeals resolved this question in favor of Central Machinery.

The parties' Second Agreed Statement of Facts states:

The Plaintiff has agreed with Gila River Farms that if any monies are recovered by the Plaintiff as a result of its action herein, the Plaintiff will remit to Gila River Farms the monies so recovered (emphasis added).

The state argues that "any monies" recovered cannot include attorneys fees



and, therefore, Central Machinery has no standing to sue for recovery of the fees. The basis for the state's argument is that although the Second Agreed Statement of Facts was signed by the attorneys in June 1976, § 1988 did not become effective until October 19, 1976. The existence or non-existence of § 1988 does not, though, affect the validity of the agreement. The parties were capable of agreeing that all monies recovered would be turned over to Gila River Farms without having to anticipate all possible sources of monies recoverable by Central Machinery. Furthermore, Central Machinery admitted in a response to the state's motion for reconsideration that "the award of . . . attorney's fees . . . will be disbursed to Gila River Farms in accordance with the Agreed Statement of Facts." This admission is a binding construction of the agreed statement of facts and is sufficient to give Central Machinery



standing to bring the motion for attorney's fees. We hold that Central Machinery has standing to bring this motion in its own right and is therefore a property party to this suit.

The state also makes a quasi-standing argument. According to the state, even if Gila River Farms was eligible for an award pursuant to § 1988, Central Machinery still could not prevail. The state argues that Central Machinery is not eligible for attorney's fees because the Indian trader statutes were designed to benefit Indians and not Indian traders. The state's argument is simply an assertion that Central Machinery's standing to bring the original action does not translate into "standing" for a related § 1988 motion. We reject this argument because the United States Supreme Court has held that § 1988 is not limited to any particular subclass of § 1983 actions. *Maier v. Gagne*, 448 U.S.



122, 128, 100 S.Ct. 2570, 2574 (1980), relying on *Maine v. Thiboutot*, 448 U.S. 1, 100 S.Ct. 2502 (1980). Central Machinery had standing to prosecute the original action. If the original action was cognizable under § 1983, then attorney's fees should be awarded to Central Machinery.

II. ATTORNEY'S FEES AWARD PURSUANT TO § 1988

Both parties agree that federal law controls any award of attorney's fees. Consequently, we only need determine whether attorney's fees were properly awarded under 42 U.S.C. § 1988. Section 1988 authorizes an award of attorney's fees in certain enumerated civil rights actions.

In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of [Title 42], . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. § 1988 (emphasis added).



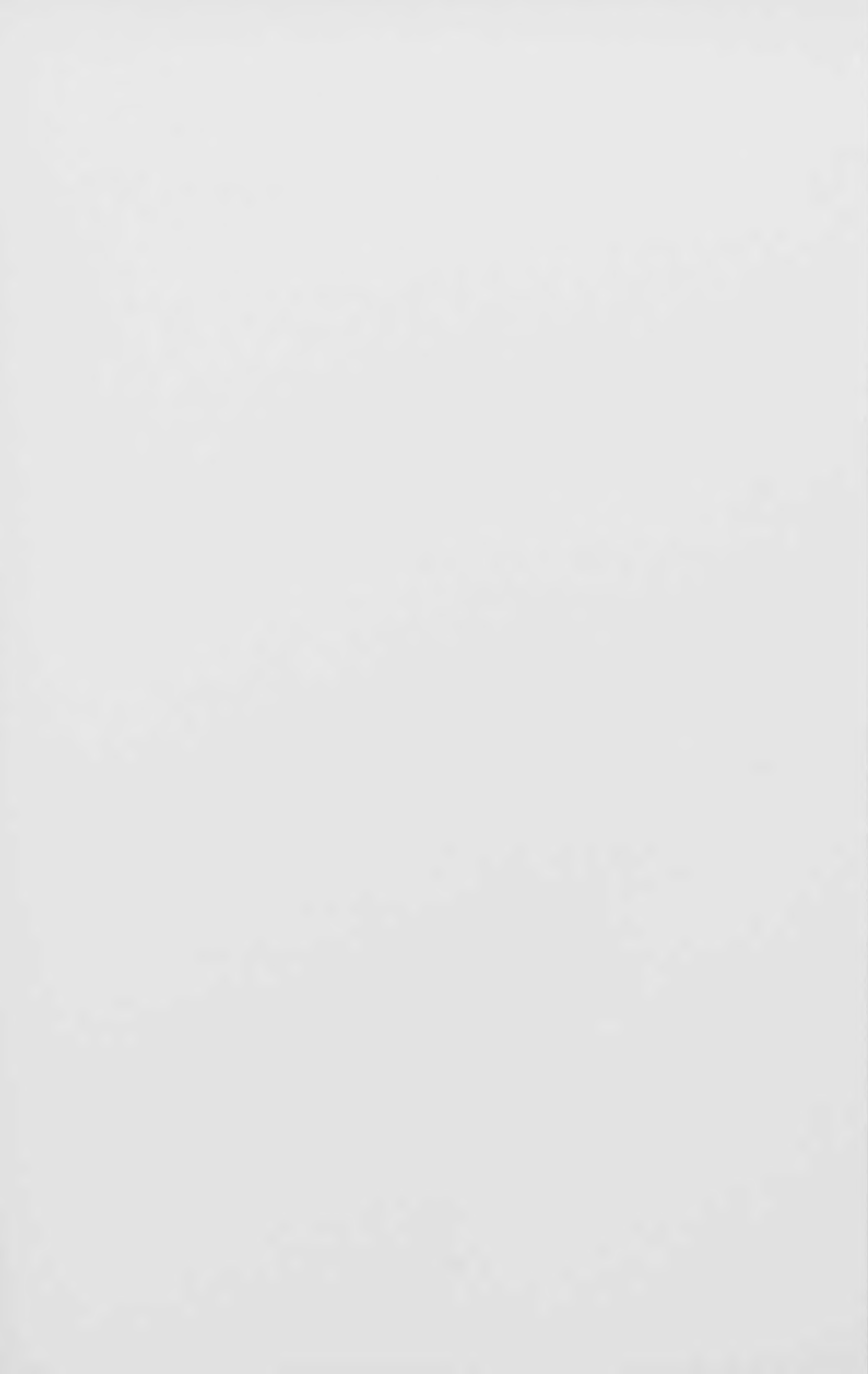
Section 1983 creates civil liability
for

[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, . . .

42 U.S.C. § 1983 (emphasis added).

Central Machinery argues that it is entitled to § 1988 attorney's fees because its original action for a tax refund is cognizable under § 1983. Although Central Machinery was the prevailing party in the underlying lawsuit, its successful claim was not brought pursuant to § 1983.³ We

³ The issue of attorney's fees may be raised for the first time after remand of the appeal in which the plaintiff prevailed. See, e.g., Bernstein v. Menard, 728 F.2d 252, 253 n. 1 (4th Cir. 1984), construing White v. New Hampshire Dept. of Employment Sec., 455 U.S. 445, 102 S.Ct. 1162 (1982). § 1983 is a remedial statute that must be construed broadly in order to



must, therefore, now determine if the ac-

3 (continued)

assist private plaintiffs who vindicate federal rights. See Collins v. Chandler Unified School Dist., 644 F.2d 759 (9th Cir.), cert. denied, 454 U.S. 863, 102 S.Ct. 322 (1981), quoting Dennis v. Chang, 611 F.2d 1302, 1305 (9th Cir. 1980). Moreover, several courts have allowed a motion for attorney's fees even though a § 1983 action was not proven or alleged in the original complaint. For example, in Gumbhir v. Kansas State Bd. of Pharmacy, 231 Kan. 507, 646 P.2d 1078 (1982), cert. denied, 459 U.S. 1103, 103 S.Ct. 724 (1983), a motion for assessment of costs "adequately pleaded a violation of . . . civil rights under § 1983 to maintain a suit for attorney fees under § 1988, . . ." even though the motion was based upon an earlier action alleging denial of constitutional rights, not a § 1983 action. See Fairbanks Correctional Center v. Williamson, 600 P.2d 743 (Alaska 1979) (sole mention of § 1983 in original complaint in parenthesis in the title of the complaint); Harradine v. Bd. of Supervisors, 73 A.D.2d 118, 425 N.Y.S.2d 182 (1980) (original complaint alleged violation of equal protection clause); Boldt v. State, 101 Wis.2d 566, 305 N.W.2d 133 (complaint alleging violation of due process clauses of the Wisconsin and United States Constitutions sufficient to plead § 1983 action in suit for attorney's fees pursuant to § 1988), cert. denied, 454 U.S. 973, 102 S.Ct. 524 (1981); accord, Consol. Freightways Corp. v. Kassel, 730 F.2d 1139 (8th Cir.) (party alleging § 1983 violation, but prevailing on other grounds, eligible for attorney's



tion for a tax refund was an action to secure "rights, privileges, or immunities secured by the Constitution and laws . . ."

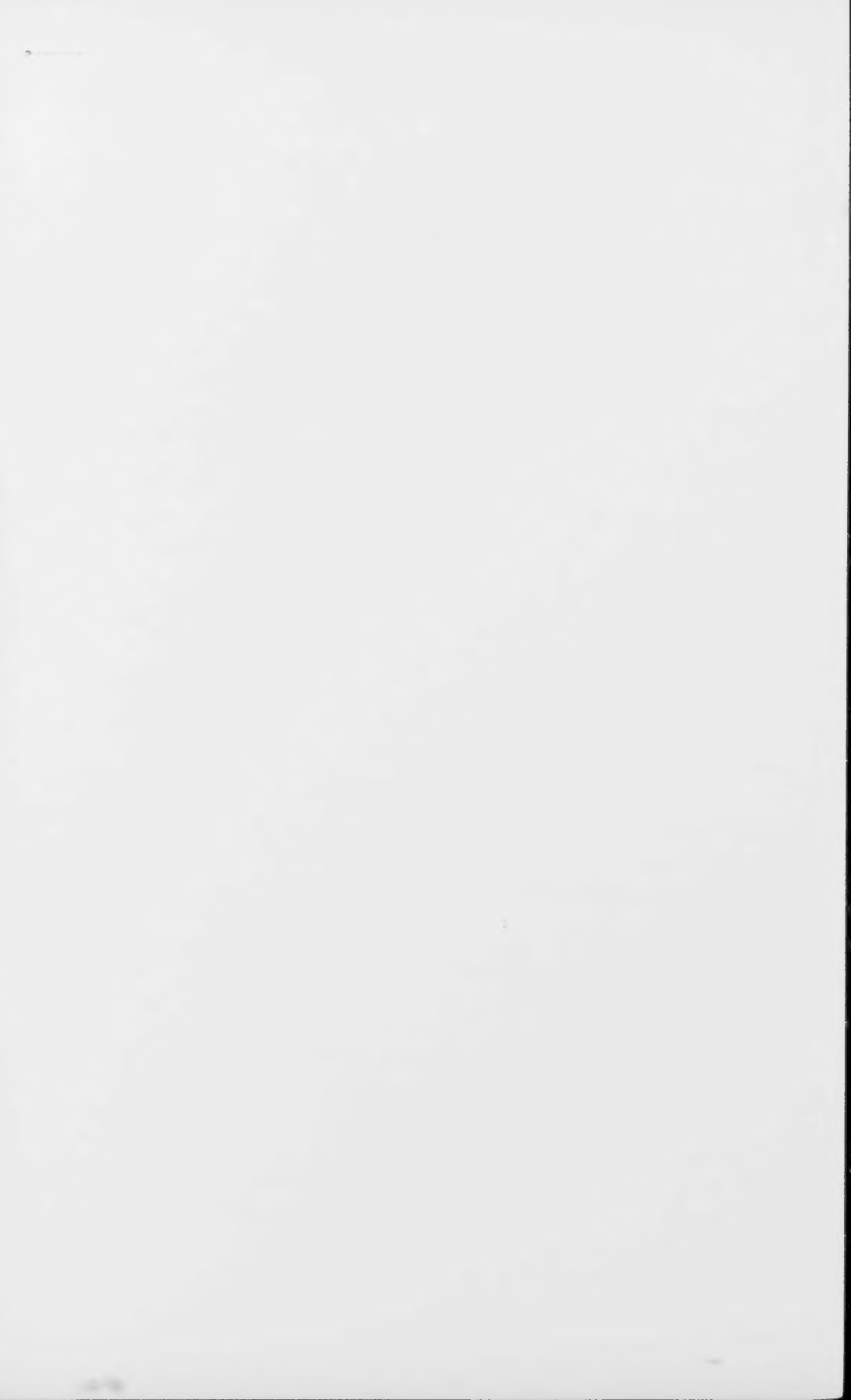
If Central Machinery's original action implicated either statutory or constitutional rights protected by § 1983, then the original award should be upheld. Maher, 448 U.S. at 128-29, 100 S.Ct. at 2574 (1980) (§ 1988 applies to all § 1983 violations).

STATUTORY BASIS FOR § 1983 ACTION

Section 1983 provides a remedy for any deprivation, under color of state law,

3 (continued)

fees if § 1983 would have been an appropriate basis for relief), cert. denied, 469 U.S. 834, 105 S.Ct. 126 (1984); Jackson v. Inhabitants of Searsport, 456 A.2d 852 (Me.) (§ 1988 award not limited to those cases where court actually "passed upon a party's section 1983 claim and ruled on it in that party's favor"), cert. denied, 464 U.S. 825, 104 S.Ct. 95 (1983). We do not believe that Central Machinery's failure to specifically allege a § 1983 cause of action in the original complaint should serve as a procedural barrier to the claim before us.

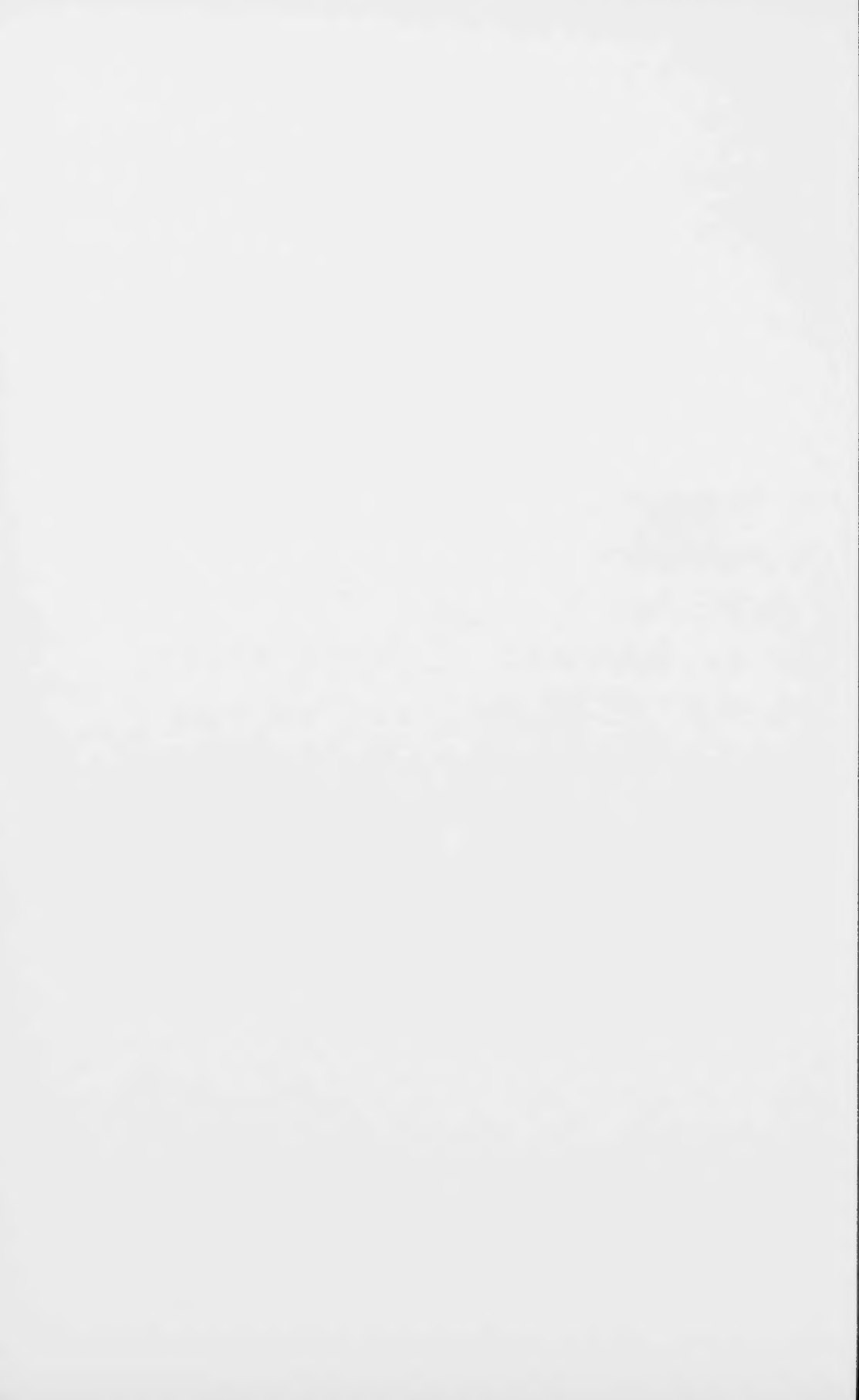


of rights created by the United States Constitution or federal statutes. Central Machinery's original claim was that Arizona could not tax a transaction between Central Machinery and the Indians because the Indian trader statutes had preempted the field of trading with Indians on reservations. Central Machinery was successful with this argument before the United States Supreme Court.

Unquestionably, then, Central Machinery's suit vindicated an interest protected by federal law. Central Machinery argues that *Maine v. Thiboutot*, supra, recognizes such interests as within the ambit of § 1983. In Maine, the Supreme Court held that the phrase "and laws" in § 1983 refers to any federal law and not just civil rights laws or equal protection laws. 448 U.S. at 6-7, 100 S.Ct. at 2505. Accordingly, Maine has been widely construed as authorizing § 1983 actions whenever a



plaintiff was adversely affected by a violation of federal law under color of state law. See, e.g., Maine, 448 U.S. at 11, 100 S.Ct. at 2508 (Powell, J., dissenting) ("The Court holds today, almost casually, that 42 U.S.C. § 1983 creates a cause of action for deprivations under color of state law of any federal statutory right"); In re Haussman, 96 A.D.2d 244, 468 N.Y.S.2d 375 (N.Y.App.Div. 1983); Wartelle & Loudan, Private Enforcement of Federal Statutes: The Rule of the Section 1983 Remedy, 9 Hast.Const.Law Quart. 487, 487 (1982) (Maine gave 42 U.S.C. § 1983 "an interpretation that, for the first time in the section's 110-year history, matched the breadth of its literal language"); Note, The Application of Section 1983 to the Violation of Federal Statutory Rights--Maine v. Thiboutot, 30 DePaul L.Rev. 651, 657 (1981) (court majority in Maine made expansive interpretation of § 1983).



We do not doubt That Justice Brennan's majority opinion in Maine, standing alone, would justify a finding that Central Machinery's original action was cognizable under § 1983:

The question before us is whether the phrase "and laws," as used in § 1983, means what it says, or whether it should be limited to some subset of laws . . .

Even were the language ambiguous, however, any doubt as to its meaning has been resolved by our several cases suggesting, explicitly or implicitly, that the § 1983 remedy broadly encompasses violations of federal statutory as well as constitutional law.

448 U.S. at 4, 100 S.Ct. at 2504. This broad language clearly would control the instant case where the state of Arizona's laws conflicted with federal laws designed to protect Indians. We believe, though, that both Central Machinery and the court of appeals rely too heavily on Maine.

The Supreme Court narrowed the reach of Maine in two subsequent landmark deci-



sions. These decisions, *Middlesex County Sewage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 101 S.Ct. 2615 (1981), and *Pennhurst State School & Hosp. v. Haldeman*, 451 U.S. 1, 101 S.Ct. 1531 (1981), establish two exceptions to the use of § 1983 to remedy federal statutory violations. It is these two exceptions, and not the broad holding of Maine, that are truly at issue in this case.

In Sea Clammers, the Supreme Court held that a federal statute containing comprehensive remedial provisions may "demonstrate congressional intent to preclude the remedy of suits under § 1983." 453 U.S. at 20, 101 S.Ct. at 2626. Thus, no cause of action will lie under § 1983 where federal statutes provide their own comprehensive remedy. In Pennhurst, the Court held that violation of federal law does not give rise to any cause of action unless Congress intended to vest enforceable rights in the



injured persons. 451 U.S. at 27-28, 101 S.Ct. at 1545. Accordingly, a plaintiff may not enforce a federal statutory violation with § 1983 unless the statute creates enforceable rights.

The state argues that both the exclusive remedy exception established by Sea Clammers and the enforceable rights exception set out in Pennhurst bar the award of attorney's fees to Central Machinery. First, the state contends that Congress has so comprehensively regulated the field of Indian trading that no § 1983 remedy exists and, therefore, no award of attorney's fees is available under § 1988. In Sea Clammers, the Court found a congressional intent to preclude a § 1983 action on the basis of "unusually elaborate enforcement provisions." 453 U.S. at 13-15, 101 S.Ct. at 2623. The Federal Water Pollution Control Act at issue in Sea Clammers authorized the government agency and states to

seek civil and criminal penalties, authorized any interested person to seek judicial review of agency action, and contained two separate private suit provisions. Id.⁴

⁴ The Supreme Court summarized relevant provisions of the Federal Water Pollution Control Act:

These Acts contain unusually elaborate enforcement provisions, conferring authority to sue for this purpose both on government officials and private citizens. The FWPCA, for example, authorizes the EPA Administrator to respond to violations of the Act with compliance orders and civil suits. § 309, 33 U.S.C. § 1319. He may seek a civil penalty of up to \$10,000 per day, § 309(d), 33 U.S.C. § 1319(d), and criminal penalties also are available, § 309(c), 33 U.S.C. § 1319(c). States desiring to administer their own permit programs must demonstrate that state officials possess adequate authority to abate violations through civil or criminal penalties or other means of enforcement. § 402(b)(7), 33 U.S.C. § 1342 (b)(7). In addition, under § 509(b), 33 U.S.C. § 1342(b)(7) [sic]. In addition, under § 509(b), 33 U.S.C. § 1369(b), "any interested person" may seek judicial review in the United States courts of appeals of various particular actions by the Administrator, including establishment of effluent standards and issuance of



The Indian trader statutes do not have similar provisions. In fact, a careful reading of the Indian trader statutes reveals no comprehensive remedial provisions. 25 U.S.C. § 264 admittedly does provide that any non-Indian who trades without a license "shall forfeit all merchandise offered for sale to the Indians or found in his possession, and shall moreover be liable to a penalty of \$500" Additionally, the Indian trader statutes do authorize administrative rule-making, e.g., 25 U.S.C. § 262 ("Any person desiring to trade with the Indians on any Indian reservation shall . . . be permitted to do so under such rules and regulations as the

4 (continued)

permits for discharge of pollutants. Where review could have been obtained under this provision, the action at issue may not be challenged in any subsequent civil or criminal proceeding for enforcement. § 1369(b)(2).

Sea Clammers, 453 U.S. at 13, 101 S.Ct. at 2623 (footnotes omitted).

Commissioner of Indian Affairs may prescribe . . ."), that in turn could provide a remedial scheme. One forfeiture provision and the possibility of additional remedies, however, is hardly the type of exclusive remedy scheme contemplated by the Court in Sea Clammers. See Smith v. Robinson, 468 U.S. 992, 104 S.Ct. 3457 (1984) (although plaintiff may have had an alternative claim under 42 U.S.C. § 1983, § 1988 attorney's fees should not have been awarded because the plaintiff's case belonged entirely within the comprehensive procedures and guarantees of the Education to the Handicapped Act (EHA); Montauk-Caribbean Airways, Inc. v. Hope, 784 F.2d 91 (2nd Cir.) (comprehensive enforcement scheme provided in Federal Aviation Act manifests congressional intent to foreclose an action under § 1983); cert. denied, ___ U.S. ___, ___ S.Ct. ___, 55 U.S.L.W. 3237 (1986); accord Keaukaha-Panaewa Community Ass'n v.

Hawaiian Homes Comm'n, 739 F.2d 1467 (9th Cir. 1984) (mere reservation of right to sue in statutory scheme is not a sufficiently comprehensive enforcement scheme to foreclose a § 1983 remedy).

The state also contends that the Indian trader statutes do not create enforceable rights as defined in Pennhurst and therefore do not give rise to a claim for § 1988 attorney fees. In Pennhurst, the plaintiff claimed that the Developmentally Disabled Assistance and Bill of Rights Act of 1975 (DDABRA) created "enforceable rights" in favor of the mentally retarded. 451 U.S. at 6, 101 S.Ct. at 1534. The Court disagreed, holding that because the DDABRA was designed only to assist states in their treatment of the mentally disabled through a "cooperative program of shared responsibilit[ies]" between the federal government and the states, it did not create enforceable rights. Id. at 22, 101

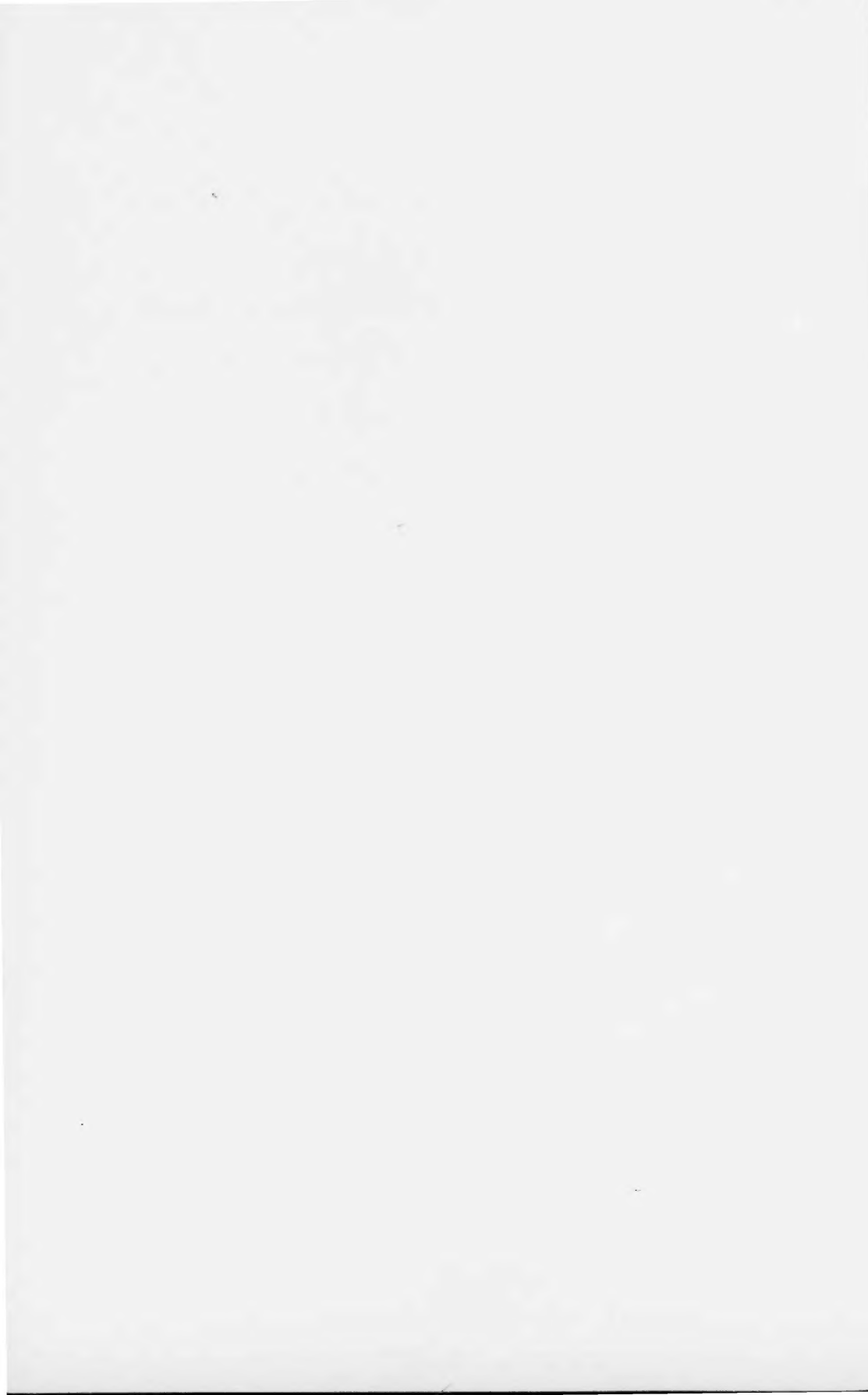
S.Ct. at 1542 (quoting *Harris v. McRae*, 448 U.S. 297, 309, 100 S.Ct. 2671, 2684 (1980)). Therefore, the Pennhurst Court concluded that it "need not reach the question whether there is a private cause of action . . . under 42 U.S.C. § 1983 to enforce [the DDABRA]." 451 U.S. at 28 n. 21, 101 S.Ct. at 1545 n. 21. Sea Clammers construed the decision in Pennhurst not to address a § 1983 issue as requiring a determination of "whether the statute at issue . . . [is] the kind that create[s] enforceable 'rights' under § 1983." Sea Clammers, 453 U.S. at 19, 101 S.Ct. at 2626.

Courts applying Pennhurst have not arrived at a uniform definition of enforceable § 1983 "rights." See generally *Boat-owners & Tenants Ass'n v. Port of Seattle*, 716 F.2d 669, 671 (9th Cir. 1983) ("our review of cases from other circuits reveals divergent views of how broadly 'rights' should be construed"). *Central Machinery*

vigorously asserts that because the Indian trader statutes were designed to specially benefit Indians, see Warren Trading Post v. Arizona Tax Comm'n, 380 U.S. 685, 690-91, 85 S.Ct. 1242, 1245-46 (1965), Indians possess "rights" enforceable in a 1983 action. Central Machinery relies heavily on the Ninth Circuit's use of the Cort v. Ash, 422 U.S. 66, 78, 95 S.Ct. 2080, 2088 (1975), implied right-of-action test in § 1983 actions. The Ninth Circuit has stated that enforceable rights arise if the applicable statute confers rights for the special benefit of the class to which the plaintiff belongs. Boatowners, 716 F.2d at 672, citing Cort, supra.

We think that Central Machinery reads Boatowners too broadly.⁵ Most courts now

⁵ Boatowners may be read as holding that the existence of special benefit creates enforceable rights. However, such a reading is inconsistent with both Pennhurst and subsequent Ninth Circuit cases. The stat-



agree that an entity does not obtain an enforceable right simply because it benefits from the statute's provisions. See, e.g., Brown v. Hous. Auth. of McRae, 784 F.2d

5 (continued)

utes at issue in Pennhurst unquestionably specially benefitted the mentally handicapped. Nevertheless, the Supreme Court left open the question of whether enforceable rights were created. Pennhurst, 451 U.S. at 27-30, 101 S.Ct. at 1545-46. Furthermore, subsequent Ninth Circuit decisions have not used the special benefit test to determine whether or not a particular statutory scheme creates enforceable rights. See Keaukaha-Panaewa Comm. v. Hawaiian Homes, 739 F.2d 1467, 1471 (9th Cir. 1984) (the Pennhurst decision "implied that a[n] [enforceable] right is created when Congress mandates, rather than merely encourages a specified entitlement").

We also cannot endorse the use of the Cort v. Ash implied right of action test in § 1983 actions. Boatowners asserted that the use of Cort v. Ash in § 1983 actions is one of three major methods of determining the existence of enforceable rights. 716 F.2d at 671-72. In support, the court cited Perry v. Hous. Auth. of Charleston, 664 F.2d 1210, 1217 (4th Cir. 1981). Boatowners, 716 F.2d at 672 n. 4. The court offered no other justification for the applicability of Cort v. Ash. Our review of Perry indicates that the Fourth Circuit did not use Cort v. Ash in its § 1983 analysis. Therefore, Boatowner's use of Cort v. Ash is both isolated and unjustified.

1533, 1537 (11th Cir. 1986); Gould, Inc. v. Wisconsin Dept. of Indus., Labor, and Human Relations, 750 F.2d 608, 616 (7th Cir. 1984), aff'd, ___ U.S. ___, 106 S.Ct. 1057 (1986). Nothing in Boatowners indicates that the mere finding that a statute is intended to provide special benefit to a particular group justifies the conclusion that enforceable rights are conferred by the statute. Boatowners was primarily concerned with the threshold issue of whether a regulatory statutory scheme is capable of supporting a § 1983 action. The Boatowners court held that the River and Harbor Improvements Act at issue, 33 U.S.C. §§ 540-633, was only intended to benefit the general public and therefore could not support a § 1983 action. 716 F.2d at 673-74. The Boatowners court never reached the issue before this court. 716 F.2d at 673-74. See White Mountain Apache Tribe v. Williams, No. 81-5348, slip op. (9th Cir. Aug. 20,

1986) (the relevant focus for inquiry in a § 1983 action is not primarily whether a regulatory scheme was designed to benefit a particular group).

Courts confronting the enforceable rights issue have not clearly drawn the line that separates mere benefit from "enforceable rights." For example, the Fourth Circuit looks to the substantive provisions of statutes to determine whether § 1983 plaintiffs are granted "tangible rights" or are merely beneficiaries of general congressional policy. Only in courts can ascertain the scope of "rights" with certainty will they be enforceable in a § 1983 action. *Phelps v. Hous. Auth. of Woodruff*, 742 F.2d 816, 821 (4th Cir. 1984); *Perry v. Hous. Auth. of Charleston*, 664 F.2d 1210, 1217 (4th Cir. 1981). The Second Circuit has also recognized that a statute containing precise standards creates enforceable rights. *Beckham v. New York City Hous.*

Auth., 755 F.2d 1074, 1077 (2nd Cir. 1985).
But see Brown, 784 F.2d at 1536 n. 3 (court chooses to concur with Wright and acknowledges that Beckham is apposite); see also Wright v. City of Roanoke Redev. & Hous. Auth., 771 F.2d 833 (4th Cir. 1985), cert. granted, ___ U.S. ___, 106 S.Ct. 848 (1985). The D.C. Circuit has said that a § 1983 action lies only when a particular course of conduct is mandated and looks to specific legislative use of words such as "shall" and "entitlement." Samuels v. Dist. of Columbia, 770 F.2d 184, 196-98 (D.C.Cir. 1985). The Third Circuit also looks to the statutory language. If statutory or regulatory language is "cast in the imperative" then enforceable rights are created. Alexander v. Pope, 750 F.2d 250, 259 (3rd Cir. 1984). See also Student Coalition for Peace v. Lower Merion School Dist., 776 F.2d 431, 438-39 (3rd Cir. 1985) (mandatory language in Equal Access Act stating "It

shall be unlawful . . . to deny equal access . . . to . . . any students who wish to conduct a meeting" creates enforceable § 1983 rights) (emphasis original).

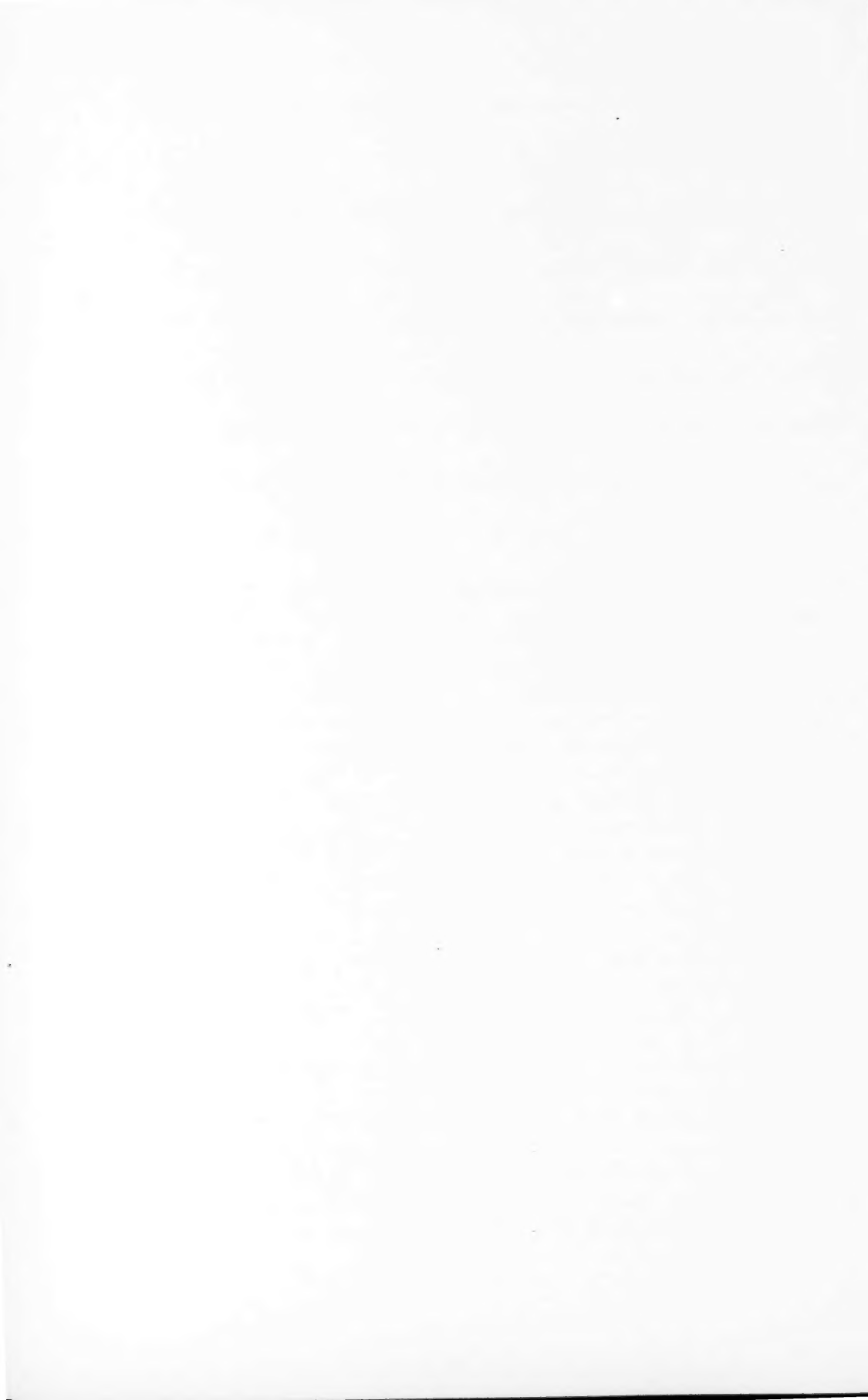
We do not have to resolve discrepancies between various circuits in order to reach a conclusion about the enforceability of "rights" created by the Indian trader statutes. The clear thrust of Pennhurst, and all the cases applying Pennhurst, is that enforceable § 1983 rights arise only when Congress mandates specific acts or standards. Only the strength of the mandate or the degree of specificity is disputed. No specific acts are required by the Indian trader statutes. No specific standards are established by the Indian trader statutes. The statutes only grant the Commissioner of Indian Affairs discretion to establish standards that conceivably could create enforceable rights. That discretion by itself, however, merely rep-



resents general congressional intent to benefit Indians.⁶

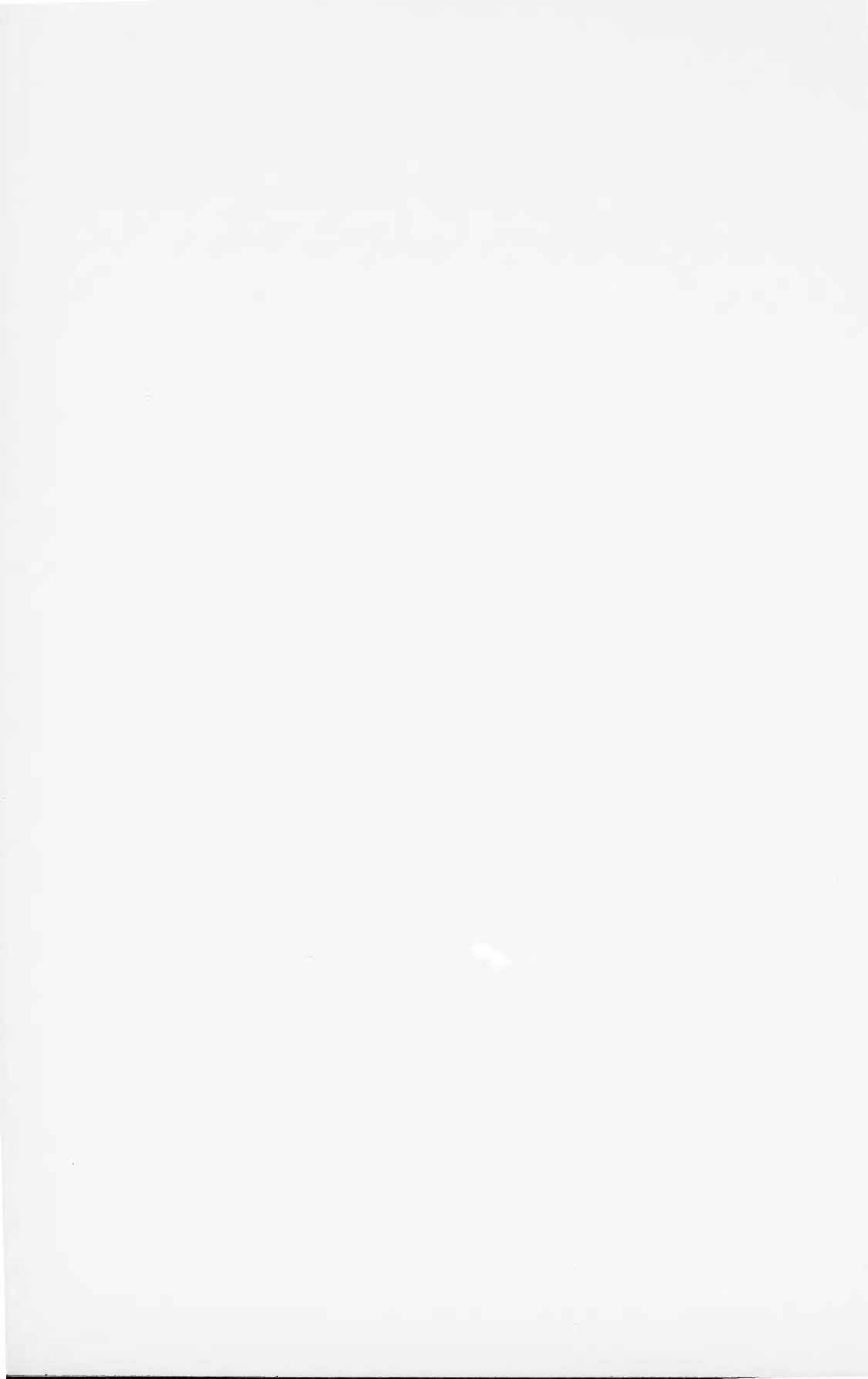
Central Machinery's best argument is found in the right of Indian tribes to force the Commisioner of Indian Affairs to adopt rules and regulations pursuant to the Indian trader statutes. In *Rockbridge v. Lincoln*, 449 F.2d 567 (9th Cir. 1971) the

⁶ The court of appeals held that Warren Trading Post, supra, was dispositive of this appeal. In particular, the court held that the Supreme Court's statement that the Indian trader statutes ensure "that no burden shall be imposed upon Indian traders," 380 U.S. at 690-91, 85 S.Ct. 1242, 1245-46, created enforceable rights. *Central Machinery v. Arizona*, slip op. at 5-6. We believe, however, that Warren Trading Post merely established that the Indian trader statutes were intended to benefit Indians. Warren Trading Post recognized that the Commissioner of Indian Affairs coul issue regulations burdening commerce on Indian reservations. 380 U.S. 688-91, 85 S.Ct. 1244-45. Congress, therefore, did not create in Indians an "enforceable right" to trade without restriction. Congress only intended that Indians trading on reservations benefit from supervision by the Commissioner of Indian Affairs. Warren Trading Post, therefore, cannot support the proposition that the Indian trader statutes create enforceable rights.



Ninth Circuit held that the Indian trader statutes did not grant the Commissioner of Indian Affairs unlimited discretion to promulgate regulations. 449 F.2d at 572. Accordingly, Indians injured through the failure of the Commissioner to issue regulations may invoke the jurisdiction of federal courts and force the Commissioner to issue regulations that benefit Indians in the manner Congress intended. See United States v. Markgraf, 736 F.2d 1179, 1183 (7th Cir. 1984) (Secretary of Agriculture may not refuse to regulate where Congress has provided standards for the exercise of discretion).

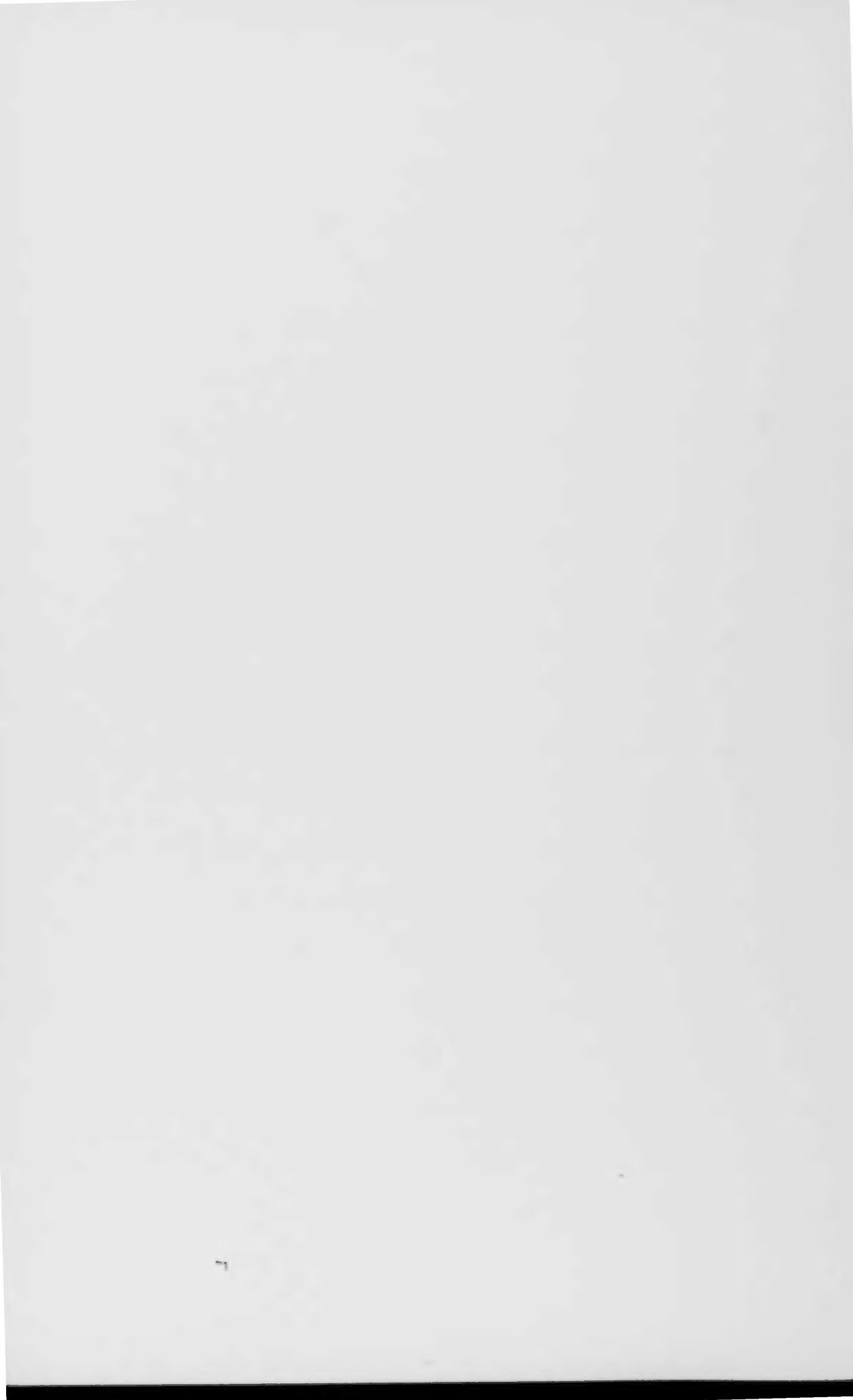
It may appear axiomatic that if Indians have the right to sue under the Indian trader statutes to force the Commissioner to act, they have enforceable rights pursuant to § 1983. Rockbridge, however, does not undercut our determination that the Indian trader statutes do not create "enforce-



able rights." Rockbridge centered on the discretion granted the Commissioner of Indian Affairs. The decision merely recognized that the Indian trader statutes were enacted to benefit Indians and that the Commissioner of Indian Affairs had to comply with federal statutes. Rockbridge, 449 F.2d at 572. Rockbridge did not hold that the Indian trader statutes establish the type of specific mandate enforceable in § 1983 actions.

Even assuming the Indian trader statutes created enforceable rights, however, we would not find the original action to be cognizable under § 1983. The original action for a tax refund was decided upon preemption grounds. The Supreme Court stated that "by enacting these [Indian trader] statutes Congress 'has undertaken to regulate reservation trading in such a comprehensive way that there is no room for the states to legislate on the subject.'" Cen-

tral Machinery Co. v. Arizona State Tax Comm'n, 448 U.S. 165-166, 100 S.Ct. at 2596, quoting Warren Trading Post, 380 U.S. at 691 n. 18, 85 S.Ct. at 1246 n. 18. The Court clearly ruled that Arizona's actions did not violate any particular federal statute or regulation. "It is the existence of the Indian trader statutes, then, and not their administration, that preempts the field of transactions with Indians occurring on reservations." 448 U.S. at 655, 100 S.Ct. at 2596. We are not persuaded, even assuming that an enforceable right existed, that such rights were violated. We must conclude, therefore, that the tax imposed by Arizona did not deprive Gila River Farms of a right, privilege or immunity secured by the laws of the United States. See Williams, slip op. at 18 (preemption claim not involving actual conflict between federal and state statutes cannot support § 1983 action).



The original tax refund action is not, therefore, cognizable under § 1983 unless Arizona violated a right, privilege or immunity guaranteed by the United States Constitution.

CONSTITUTIONAL BASIS FOR ATTORNEY'S FEES

Central Machinery has argued that Arizona's tax violated both the commerce clause and the Indian commerce clause. U.S. Const. art. I, § 8, cl. 3. The court of appeals, however, did not look to the commerce clause but rather the supremacy clause when it held that the tax refund action was cognizable under § 1983. *Central Machinery Co. v. Arizona*, slip op. at 9. We hold that none of these three constitutional provisions adequately supports the award of attorney's fees.

Commerce Clause

The United States Supreme Court in-



validated the Arizona tax because the Indian trader statutes regulate reservation trading in a comprehensive fashion. *Central Machinery v. Arizona State Tax Comm.*, 448 U.S. at 165-66, 100 S.Ct. at 2596. Although the Indian trader statutes were enacted pursuant to Congress' commerce clause power, Warren Trading Post, 380 U.S. at 691 n. 18, 85 S.Ct. at 1246 n. 18, the Supreme Court did not hold, nor is there any authority for holding, that a state tax on Indians is a violation of the commerce clause. See, e.g., Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 480-81 n. 17, 96 S.Ct. 1634, 1645 n. 17 (1976). Accordingly, no violation of the commerce clause is at issue in this case. Cf. *Consol. Freightways Corp. v. Kassel*, 730 F.2d 1139 (8th Cir.) (unsuccessful claim for \$ 1988 attorney's fees brought after state statutes restricting use of sixty-five foot trailers held invalid), cert.

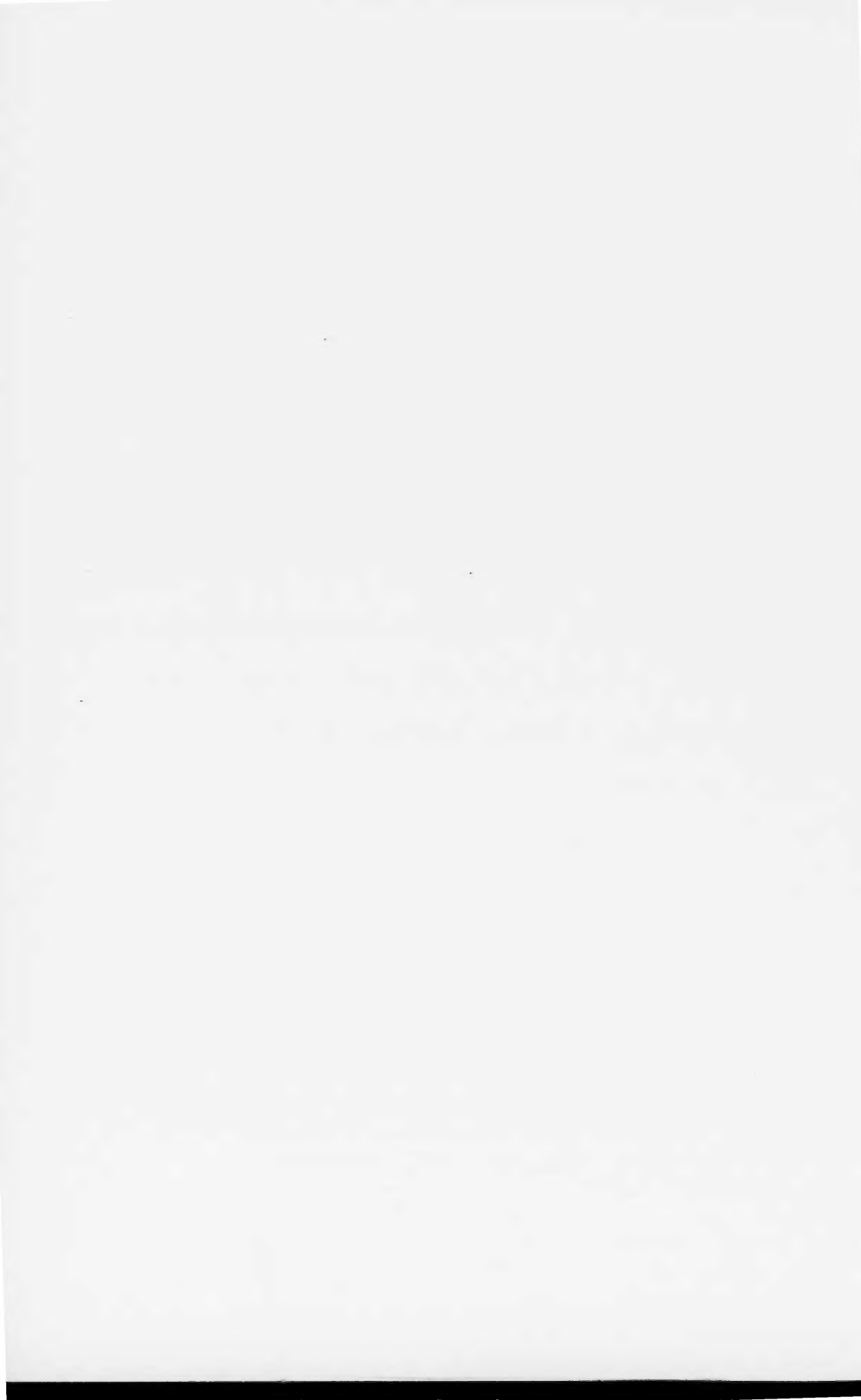


denied, 469 U.S. 834, 105 S.Ct. 126 (1984).

Indian Commerce Clause

Central Machinery argues that the Indian commerce clause provides a separate constitutional basis for a § 1983 cause of action. The Indian commerce clause actually is found within the commerce clause, art. 1, § 8: "Congress shall have Power . . . [t]o regulate Commerce . . . with the Indian tribes[.]" Central Machinery claims that this clause, of its own force, does not tolerate a State burden directly imposed on commerce with the tribe itself on its own reservation. The Supreme Court, however, has stated:

It can no longer be seriously argued that the Indian Commerce Clause, of its own force, automatically bars all state taxation of matters significantly touching the political and economic interests of the Tribes. That Clause may have a more limited role to play in preventing undue discrimination against, or burdens on, Indian commerce.



Washington v. Confederated Tribes, 447 U.S. 134, 158, 100 S.Ct. 2069, 2083 (1980) (citations omitted).

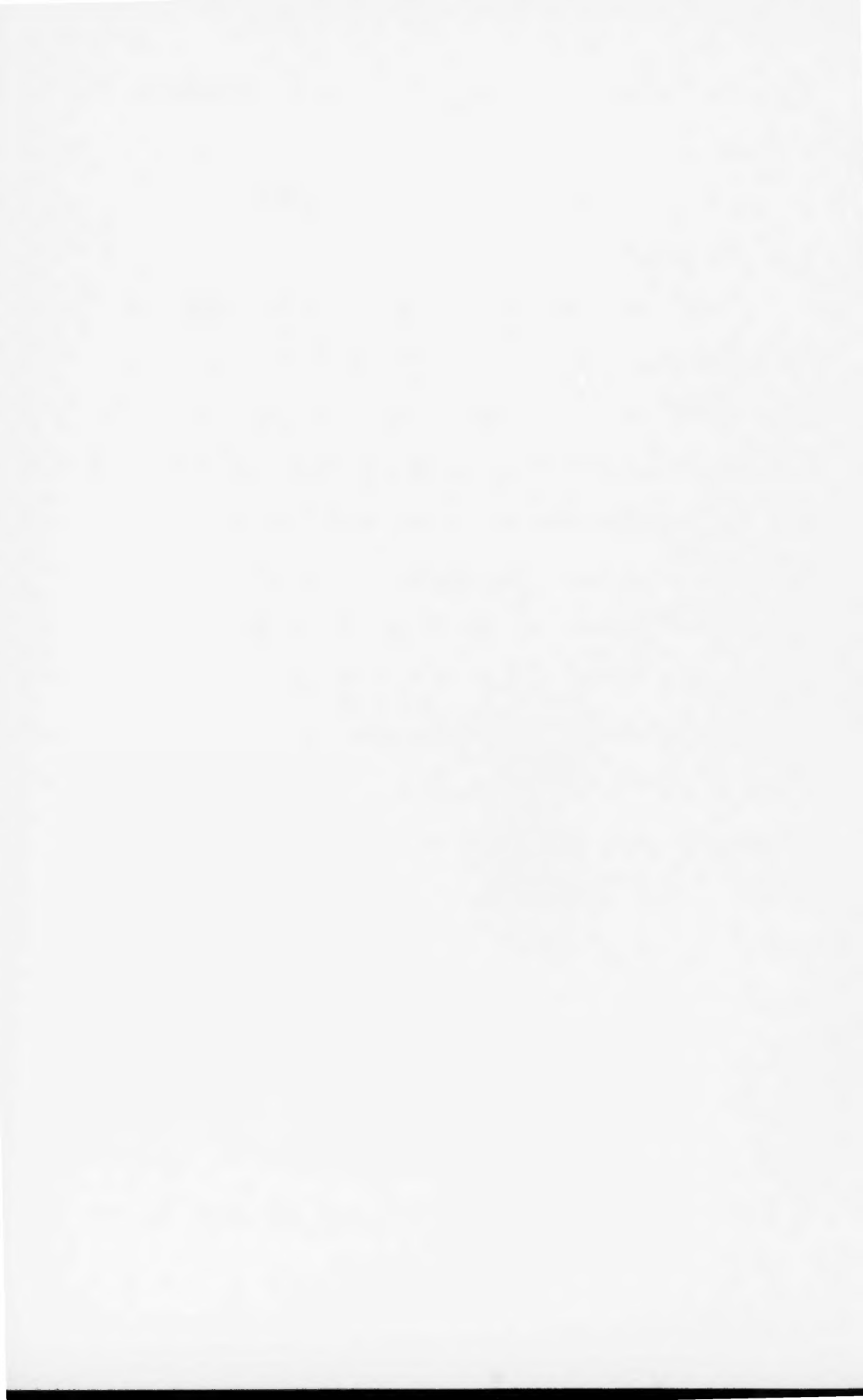
Central Machinery cites three decisions of the United States Supreme Court to support its position. All three cases simply established Congress' expansive power to control Indian commerce. The Kansas Indians, 72 U.S. (5 Wall.) 737 (1866), held only that certain Indian tribes, under the exclusive control of Congress, were not subject to state taxation. Id. at 755-57. United States v. Forty-thraee Gallons of Whiskey, 93 U.S. 188 (1876), held only that Congress has the power to freely regulate Indian commerce. Id. at 194. Similarly, United States v. Holliday, 70 U.S. (3 Wall.) 407 (1865), established simply that the Indian commerce clause authorized federal regulation of Indian commerce occurring completely within one state's boundaries. Id. at 418. The cases do not define state



behavior that violates the Indian commerce clause.

The Supremacy Clause

We disagree with the court of appeals determination that rights secured by the supremacy clause are enforceable in a § 1983 action. Every federal treaty, statute or regulation is "secured" by the supremacy clause. Williams, slip op. at 7, quoting Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 613, 99 S.Ct. 1905, 1913-14 (1979). If the supremacy clause created enforceable rights, the holdings in Pennhurst and Sea Clammers would be undermined. Any violation of a federal statute under color of state law would be a "violation" of the supremacy clause and, therefore, the basis of a § 1983 action. Pennhurst and Sea Clammers establish, though, that not every federal statute will support a § 1983 action. The court of appeals de-



cision, then, conflicts with these recent Supreme Court cases. Furthermore, if the supremacy clause created substantive rights, then the phrase "and laws" in § 1983 would be superfluous because any violation of a federal statute, under color of state law, would be a constitutional violation. We will not construe the statute in such a manner. See Chapman, 441 U.S. at 621-23, 99 S.Ct. at 1918-19 (1979), quoting Georgia v. Rachel, 384 U.S. 780, 789-92, 86 S.Ct. 1783, 1788-90 (1966); Williams, slip op. at 18 (no cognizable rights under § 1983 were created merely as a result of preemption under the supremacy clause); Gould, Inc., 750 F.2d at 616 (supremacy clause violation does not present a cognizable claim under § 1983).

Our position is supported by Chapman, supra. In Chapman, the Supreme Court held that the supremacy clause did not create substantive rights within the meaning of 28

U.S.C. § 1343(3). Id. at 614-15, 99 S.Ct. at 1914-15. Section 1343(3) grants federal courts jurisdiction "[t]o redress the deprivation, under color of any State law, . . . of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights" The Court held that "to give meaning to the entire statute [§ 1343] as written by Congress, we must conclude that an allegation of incompatibility between federal and state statutes and regulations does not, in itself, give rise to a claim 'secured by the Constitution'" 441 U.S. at 615, 99 S.Ct. at 1915. Similarly, an allegation of incompatibility between the Arizona sales tax and the Indian trader statutes cannot support a § 1983 action.

In conclusion, the state has not subjected Central Machinery or the Indian River Farms to a deprivation of rights, priv-



ileges or immunities secured to them by the Constitution and laws of the United States. The § 1988 claim must fail because the original tax refund action is not cognizable under § 1983.

The opinion of the court of appeals affirming an award of attorney's fees to Central Machinery is vacated. Central Machinery's motion for attorney's fees under 42 U.S.C. § 1988 is hereby dismissed.

JACK D. H. HAYS, Justice

CONCURRING:

WILLIAM A. HOLOHAN, Chief Justice

FRANK X. GORDON, JR., Vice Chief Justice

JAMES DUKE CAMERON, Justice

STANLEY G. FELDMAN, Justice

MOTION FILE
DEC 19 1986

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

WHITE MOUNTAIN APACHE TRIBE, et al.,
Petitioners

v.

ARIZONA STATE TRANSPORTATION
DEPARTMENT, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF
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BENTON UTU UTU GWAITU PAIUTE TRIBE;
BIG LAGOON RANCHERIA; BISHOP PAIUTE
SHOSHONE TRIBE; CABAZON BAND OF
MISSION INDIANS
(additional amici on inside cover)
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Campo Band of Mission Indians;
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Death Valley Timbisha Tribe;
Eastern Band of Cherokee Indians;
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Gila River Indian Community;
Hoopa Valley Tribe;
Keweenaw Bay Indian Community;
La Jolla Band of Mission Indians;
Lummi Indian Tribe;
Manzanita Band of Mission Indians;
Menominee Indian Tribe of Wisconsin;
Mescalero Apache Tribe;
Northern Arapahoe Tribe;
Oglala Sioux Tribe;
Pala Band of Mission Indians;
Pit River Tribe;
Pueblo of Acoma;
Pyramid Lake Paiute Tribe of Indians;
Rincon Band of Mission Indians;
Rohnerville Rancheria;
Sac and Fox Tribe of the Mississippi in
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San Pasqual Band of Mission Indians;
Santa Rosa Rancheria;
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American Indian Bar Association;
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No. 86-814

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

WHITE MOUNTAIN APACHE TRIBE, et al.,
Petitioners

v.

ARIZONA STATE TRANSPORTATION
DEPARTMENT, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF
AMICI CURIAE
OF THE AK-CHIN INDIAN COMMUNITY, ET AL.

Pursuant to Rule 36.1, amici curiae
consisting of thirty-seven federally
recognized Indian tribes, and two
national Indian organizations,

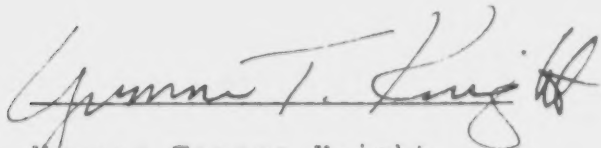
respectfully move this Court for leave to file the attached brief amici curiae in support of the White Mountain Apache Tribe's petition for writ of certiorari in the above-captioned case. Respondent Arizona State Transportation Department objects to the filing of the brief of amici, and therefore, this motion is necessary.

Amici have a substantial interest in the resolution of the issues raised by petitioner in this case. The decision of the Ninth Circuit Court of Appeals seriously handicaps the ability of Indian tribes to vindicate their rights to be free from state interference with the trust relationship between Indian tribes and the federal government.

Amici submit the attached brief to assist in showing the Court that the issues presented by the petition for writ

of certiorari are of substantial importance because they involve the construction of the scope of 42 U.S.C. § 1983 and the interrelationship between that statute and the rights of American Indian tribes under federal statutory trust schemes.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Yvonne T. Knight", written over a horizontal line.

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No. 86-814

IN THE
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Respondents.

BRIEF AMICI CURIAE
OF THE AK-CHIN INDIAN COMMUNITY, ET AL.

INTEREST OF THE AMICI CURIAE

Amici curiae are thirty-seven federally recognized Indian tribes, and two national Indian organizations committed to the protection of tribal rights. The National Congress of American Indians, founded in 1944, is the oldest and largest national organization

of Indian governments and individuals in the United States, with a membership of federally recognized tribes representing a combined population of over 750,000 American Indians and Alaska Native people. The American Indian Bar Association was founded in 1976 to facilitate more effective legal representation for all Indian people, and has a national membership of Indian attorneys and other professionals and paraprofessionals involved in the provision of legal services to American Indians.

Procuring relief for deprivations of tribal rights is greatly facilitated by the ability to obtain attorney's fees. Some amici tribes are now seeking attorney's fees in federal and state courts. All amici are concerned that the unavailability of attorneys fees

under 42 U.S.C. § 1983 will severely limit the ability of American Indian tribes to enforce their rights under federal statutory trust schemes designed to promote tribal self-government and economic self-sufficiency. In most instances, the federal trustee, either through choice or neglect, fails to defend the integrity of the trust established by such legislation. For example, the United States was not a party plaintiff in any of the cases brought by tribes in this Court to enforce preemptive federal trust legislation.

SUMMARY OF REASONS FOR GRANTING THE WRIT

This case presents the question of whether federal and state appellate courts have misinterpreted Pennhurst State School and Hospital v. Halderman,

451 U.S. 1 (1981) as limiting Maine v. Thiboutot, 448 U.S. 1 (1980). The misinterpretation has taken two directions: (1) twisting Pennhurst to justify excluding from 42 U.S.C. § 1983 rights already enforced pursuant to other laws; and (2) excepting subsets of laws from the coverage of § 1983. Both results are contrary to Thiboutot. Neither result is justified by Pennhurst.

Assuming arguendo that the lower courts are correct in adopting limitations on the scope of § 1983, this Court should clarify what those limitations are. Presently there exists much confusion in and among the decisions of the appellate courts. The Ninth Circuit decision in this case is a prime example of the confusion that can result from the lack of guidance from this Court.

REASONS FOR GRANTING THE WRIT

- I. THIS CASE PRESENTS THE IMPORTANT FEDERAL QUESTION OF WHETHER THE LOWER COURTS ARE CORRECT IN CONSTRUING PENNHURST STATE SCHOOL AND HOSPITAL V. HALDERMAN, 451 U.S. 1 (1981) AS LIMITING THIS COURT'S HOLDING IN MAINE V. THIBOUTOT, 448 U.S. 1 (1980)

In Maine v. Thiboutot, 448 U.S. 1 (1980), this Court held that 42 U.S.C. §1983, which provides a civil remedy for deprivation under the color of state law of any "rights, privileges, or immunities secured by the Constitution and laws" protects all federal rights (emphasis added). The phrase "and laws" was not to be limited to a particular subset of laws.

Subsequently, the Court decided Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981), and Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981) (some statutory schemes themselves reflect an intent to foreclose a §1983

action).^{1/}

The Ninth Circuit and other appellate courts, both state and federal, have substantially curtailed the effect of Thiboutot, ostensibly in reliance on Pennhurst. Limitation has come by excepting out subsets of laws, as the Ninth Circuit has done here, discussed infra, and by excepting out from § 1983 subsets of enforceable rights.

Probably the clearest example of the latter limitation is the just-decided Arizona Supreme Court case of Central Machinery Co. v. State of Arizona, No. 18493-PR (Ariz. Dec. 12, 1986) (Attached as an appendix to Respondents' Brief In

^{1/}Sea Clammers obviously did limit Thiboutot, but not in a manner relevant here.

Opposition).^{2/} In rejecting the application for attorneys fees in Central Machinery, the Arizona Supreme Court acknowledged that "[w]e do not doubt that Justice Brennan's majority opinion in Maine, standing alone, would justify a finding that Central Machinery's original action was cognizable under §1983." (See appendix to Respondents' Brief). The court, however, felt that Pennhurst had significantly limited Maine v. Thiboutot.

Pennhurst holds that merely precatory statutory language does not create rights and therefore the question of enforceability under § 1983 or any other

^{2/}The case underlying the claim for attorneys fees in Central Machinery Co. v. State of Arizona, was decided by this Court on the same day as the case providing the basis for the claim for fees here. See Central Machinery Co. v. Arizona State Tax Comm'n, 448 U.S. 160 (1980); White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980).

statute need not be reached. Appellate courts, however, have failed to include within § 1983 rights already established, thus denying recovery of attorney's fees under 42 U.S.C. § 1988. Pennhurst does not hold that enforceable rights, such as are involved here, can ever be excluded from § 1983 protection, and the appellate courts are in error in relying on Pennhurst for this exclusion.

The Arizona Supreme Court's opinion also summarizes the confusion which exists in federal circuit courts after Pennhurst. (See appendix to Respondents' Brief). The Ninth Circuit itself acknowledges a conflict between its decision in this case and decisions in two other circuits. See Yapalater v. Bates 644 F.2d 131 (2d Cir. 1981), cert. denied, 455 U.S. 908 (1982); Kennecott Corp. v. Smith, 637 F.2d 181 (3d Cir.

1980). Contrary to the Ninth Circuit's decision here, the New Mexico Court of Appeals in Ramah Navajo School Bd., Inc. v. Bureau of Revenue, 104 N.M. 302, 720 P.2d 1243 (N.M. Ct. App. 1986), cert. denied, 55 U.S.L.W. 3310 (U.S. Nov. 4, 1986) (No. 86-367) (App. I to Petitioners' Brief at A-143 to A-165) awarded attorney's fees based upon its conclusion that the preemption of state taxes by federal statutes is a claim actionable under §1983.

It is apparent that only a definitive answer by this Court can bring order out of the chaos presently existing over this important issue. This case presents the opportunity to do so.

II. ASSUMING ARGUENDO THAT § 1983
DOES NOT PROVIDE A REMEDY FOR
VIOLATION OF ALL FEDERAL RIGHTS,
THE NINTH CIRCUIT'S DECISION
THAT AN INDIAN TRIBE PREVAILING
ON A PREEMPTION CLAIM IS NOT
ENTITLED TO § 1983 REMEDIES
RAISES IMPORTANT QUESTIONS
REGARDING THE PROPER STANDARDS
TO BE APPLIED TO DETERMINE THE
SCOPE OF § 1983.

Assuming arguendo that the Ninth
Circuit and other appellate courts are
correct in adopting standards which
restrict the applicability of § 1983,
this Court should accept review of this
case to define the proper standards to be
applied to determine what laws and rights
are within the scope of § 1983.

A. There Presently Exists Confusion
Among State And Federal
Appellate Courts As To The
Proper Standards By Which to
Determine Whether A Right Is
Enforceable Under § 1983.

As recognized by the Arizona Supreme
Court in Central Machinery Co. v. State
of Arizona, (attached as an appendix to

respondents' brief) the lower courts confronting the issue of rights enforceable under § 1983 "have not clearly drawn the line that separates mere benefit from 'enforceable rights.'" That Court further noted that there are "discrepancies between various circuits . . . about the enforceability of 'rights'" within § 1983. The question of what rights are enforceable under § 1983 is too important to allow "discrepancies" to exist in the lower courts.

B. The Limitations On § 1983, Adopted By The Ninth Circuit In This Case, Have No Basis In Pennhurst; And Reflect A Misapprehension Of The Unique Nature Of Tribal Rights Under Federal Trust Legislation.

In White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980), the Tribe prevailed on its claim that the federal Indian timber statutes, 25 U.S.C. §§ 406-07, preempted the imposition of

Arizona's motor carrier license and fuel use taxes. On remand, the District Court awarded the Tribe attorney's fees under § 1988 because it concluded that the Tribe's claim was actionable under § 1983. White Mountain Apache Tribe v. Williams, No. Civ. 73-788 PCT WEC (D. Ariz. Mar. 11, 1981) (Craig, District Judge). Reversing the award, a majority of a 3-judge panel of the Ninth Circuit concluded that the Tribe's preemption claim was not actionable under § 1983. White Mountain Apache Tribe. v. Williams, 798 F.2d 1205 (9th Cir. 1986) ([Second] Amended Opinion).

1. The Ninth Circuit's Limitation On The Reach of § 1983 Is Based Upon A Misapprehension Of The Supremacy Clause And Its Interrelationship With The Indian Commerce Clause.

The primary error of the Ninth Circuit was in characterizing the

question before it as "whether the Supremacy Clause creates 'rights, privileges or immunities' within the ambit of § 1983." (Appendix To Petitioners' Brief at A-5.) The Supremacy Clause does not create rights. Chapman v. Houston Welfare Rights Org., 441 U.S. 600 (1979). The Indian Commerce Clause is the source of the rights at issue here. McClanahan v. Arizona State Tax Comm'n, 441 U.S. 164, 172 and n.7 (1973); Ramah Navajo, 720 P.2d at 1254 (A-160). The Ninth Circuit then compounds its error by classifying the Supremacy Clause as a power allocating provision of the Constitution and concluding from Chapman: "power conferring provisions of the Constitution do not create 'rights, privileges, or immunities' within the meaning of

§ 1983." (A-9). Chapman made no such holding.

Chapman acknowledges that the Supremacy Clause secures rights no matter what their source. 441 U.S. at 613. In other words, the Supremacy Clause is a common factor in the priority of all rights under federal law whether they derive from those parts of the Constitution which spell out individual rights or those which enumerate the power of the federal government. The Supremacy Clause does not belong to either side of this equation. Nevertheless the Ninth Circuit classifies it with those provisions of the constitution which apportion power and holds that those rights are not protected by § 1983. The Court insists this is so even if a regulatory scheme was designed to benefit the Indians (A-12).

Rather the focus must be on the basis of the Supreme Court's decision in Bracker--preemption pursuant to the Supremacy Clause. So directed, our inquiry leads to the conclusion that the Bracker decision is grounded not on individual rights but instead on considerations of power--the division of authority between the state and the national government (A-12).

Thus the Ninth Circuit holding is based both on a misapprehension of the nature of the Supremacy Clause and the mistaken view that legislation enacted pursuant to constitutional provisions other than those dealing with individual rights cannot give rise to rights protected by § 1983.^{3/}

^{3/}Admittedly the court stated that it was restricting its holding to cases where it saw no direct violation, but explicitness should have no bearing on whether the source of the right is one capable of establishing individual rights or not. See, fn. 7 at A-10.

The point of Thiboutot is that rights do not have to derive from those sections of the Constitution dealing with civil rights in order to be protected by § 1983. See also, Ramah Navajo, 720 P.2d at 1254 (A-160 to A-161) (acting pursuant to the Indian Commerce Clause, Congress granted the right to coordinate education of Indian children and an immunity from taxation).

The Ninth Circuit opinion thus excepts out vast subsets of federal law from the protection of § 1983. Nothing in Pennhurst remotely suggests such a limitation of Thiboutot.

2. The Ninth Circuit Erred In Holding That Implied Tribal Rights Based On The Indian Preemption Doctrine Are Not Enforceable Under § 1983.

The Ninth Circuit's decision in this case excepts a broad range of tribal rights from § 1983 protection, and from

the right to attorney's fees. In effect, the Ninth Circuit applies the narrower non-Indian preemption doctrine to determine what Indian rights are enforceable under § 1983.

In contrast to non-Indian cases, implied preemption in Indian law is the rule, rather than the exception. See, e.g., White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980); Williams v. Lee, 358 U.S. 217 (1959); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983). As a general rule, absent express congressional authority, state laws are inapplicable in Indian country. See, e.g., Montana v. Blackfeet Tribe of Indians, 471 U.S. ____, 105 S.Ct. 2399 (1985). This contrasts sharply with the general rule in non-Indian preemption cases, in which state laws apply except to the extent they specifically conflict

with federal laws. See, e.g., Kleppe v. New Mexico, 426 U.S. 529 (1976). As this Court stated in Bracker, "it [is] generally unhelpful to apply to federal enactments regulating Indian tribes those standards of pre-emption that have emerged in other areas of the law." 448 U.S. at 143.

This broad standard of preemption, applicable only to Indian cases, has generated a broad scope of strong tribal rights. In this case, it is indisputable that the Tribe has the right to enjoin state interference with the federal-tribal relationship established by the timber statutes. See, White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980). The general right of tribes to enforce their right to non-interference by the states has been affirmed consistently by this Court when

construing federal legislation. See,
Montana v. Blackfeet Tribe of Indians,
105 S.Ct. 2399 (1985); New Mexico v.
Mescalero Apache Tribe, 462 U.S. 324
(1983); Ramah Navajo School Bd., Inc. v.
Bureau of Revenue, 458 U.S. 832 (1982);
Central Machinery Co. v. Arizona State
Tax Comm'n, 448 U.S. 160 (1980);
Washington v. Confederated Tribes of the
Colville Indian Reservation, 447 U.S. 134
(1980); McClanahan v. Arizona State Tax
Comm'n, 411 U.S. 164 (1973).

Thus, the direct violation test
applied by the Ninth Circuit in this case
has no application in Indian law where,
unlike non-Indian cases, preemption can
be implicit. This Court has expressly
held that the test for preemption in
Indian law is much broader than a "direct
violation" and so, accordingly, should be
the test for whether a tribe's claim

supports an action under § 1983.

Even if the direct violation test should be applied here, it is met on the facts of this case. The Ninth Circuit majority incorrectly concluded that no violation of tribal rights occurred in this case. This Court held in Bracker that the Tribe has the right to be free from state interference with the implementation of the timber statutes. A fortiori the state is obligated to refrain from interference. Unlike the federal funding scheme reviewed in Pennhurst, state compliance with this obligation is mandatory. Failure to comply by wrongfully interfering may be enjoined. See, Bracker, 448 U.S. 136.

These rights, obligations and remedies are at the heart of the decision in Bracker. The state, by taxing the

timber harvest activities, breached its obligation of non-interference. This Court held that the Tribe is entitled to relief from this unjustified interference. 448 U.S. at 148 and 151. This holding was based on the ground that "at the most general level," the state tax "threatens federal objectives," and "undermines federal policy." This Court then stated that "the imposition of the state taxes would adversely affect the Tribe's ability" to achieve the purposes of the statute. 448 U.S. at 149-50 (emphasis added). Further, the regulations state as one of their objectives "'development of Indian forests by the Indian people for the purpose of promoting self-sustaining communities, to the end that the Indians may receive from their own property not only the stumpage value, but also the

benefit of whatever profit it is capable of yielding and whatever labor the Indians are qualified to perform.' 25 C.F.R. § 141.3(a)(3) (1979)." 448 U.S. at 147 (emphasis added). The timber statutes and regulations gave rights to the tribe and these rights were directly violated by the state's attempt to impose its taxes.

CONCLUSION

Congress has long secured tribal rights from deprivation by the states. The decision of the Ninth Circuit is contrary to this congressional tradition, and prejudices those Indian tribes whose access to legal assistance is essential but severely restricted by their poverty. Moreover, in this case this Court has expressly upheld the Tribe's right to state non-interference with the implementation of the timber statutes--a

right which is the corollary of the
Tribe's right to political and economic
self-sufficiency. To properly fulfill
the intent of Congress in securing tribal
rights, the protections of the Civil
Rights Act remedies should be available
to assist in vindicating these rights.

December 17, 1986

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(A)
No. 86-814

In The
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REPLY TO BRIEF IN OPPOSITION

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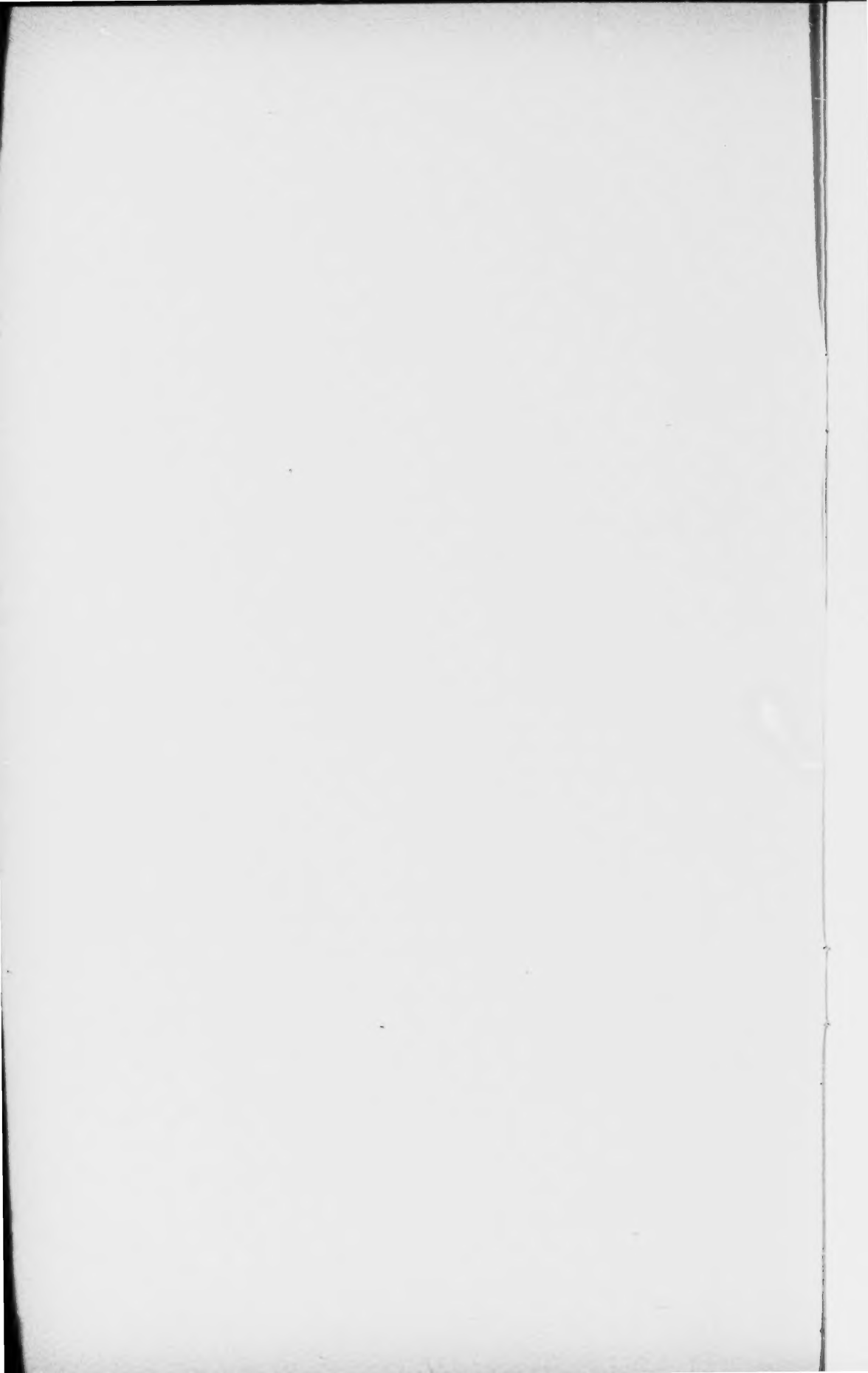


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ARGUMENT

THE DECEMBER 12, 1986, DECISION OF THE ARIZONA SUPREME COURT IN *CENTRAL MACHINERY COMPANY V. STATE OF ARIZONA* CONFIRMS THE NEED FOR SUPREME COURT RESOLUTION OF THIS CASE.

The nationwide importance of this decision uniquely disfranchising Indian rights from the remedies of 42 U.S.C. § 1983, including attorney's fees under 42 U.S.C. § 1988, is confirmed by the Arizona Supreme Court's December 12, 1986, decision in *Central Machinery Company v. State of Arizona*, No. 18493-PR ("*Central Machinery II*"), printed in the Brief in Opposition, pp. 23-63. Following the Ninth Circuit's lead in this case, *Central Machinery II* goes further

and announces that *Maine v. Thiboutot*, 448 U.S. 1 (1980), has been overruled in part and declines to follow it, conceding as follows:

Unquestionably, then, Central Machinery's suit vindicated an interest protected by federal law. . . .

We do not doubt that Justice Brennan's majority opinion in *Maine*, standing alone, would justify a finding that Central Machinery's original action was cognizable under § 1983: [quotation omitted]. This broad language clearly would control the instant case where the State of Arizona's laws conflicted with federal laws designed to protect Indians. (Brief in Opposition, pp. 36, 38).

The Arizona Supreme Court alternatively holds that §§ 1983 and 1988 remedies may be denied even when federal statutes do create rights:

Even assuming the Indian traders statutes created enforceable rights, however, we would not find the original action to be cognizable under § 1983. (Brief in Opposition, p. 54).

We are informed by counsel for the Tribe and Central Machinery Company that *Central Machinery II* will be brought here on petition for certiorari.

The clearest of conflicts is present. The Ninth Circuit decision in this case and the Arizona Supreme Court decision in *Central Machinery II* are in direct conflict with the New Mexico decision in *Ramah Navajo School Board, Inc. v. Bureau of Revenue*, 104 N.M. 230, 720 P.2d 1243 (Ct. App. 1986), *cert. denied*, 55 U.S. L.W. 3310 (U.S. Nov. 4, 1986).

The nationwide importance of this case is apparent. It is evidenced by the unusual circumstance that 39 states appeared as amici curiae in support of Arizona in the Ninth Circuit. Other Indian tribes are pursuing attorney's fees claims in litigation throughout the country which will be governed by the issues resolved inconsistently by these cases. (See Motion for Leave to File Brief and Brief Amici Curiae

of the Ak-Chin Indian Community [and 36 other tribes] p. 2, filed December 17, 1986, in this case.)

This case is worthy of certiorari on each of its three ascending levels of doctrinal and practical breadth. As an interpretation of the federal Indian timber laws it will preclude attorney's fees awards to other tribes which have successfully restrained state encroachment on Indian timber rights. *E.g.*, *Hoopa Valley Tribe v. Nevins*, 590 F.Supp. 198 (N.D. Cal. 1984). As a methodology for disfranchising federal statutory rights of Indians from §§ 1983 and 1988 remedies, it threatens many Indian rights beyond timber rights. *Central Machinery II* is its first progeny of that sort. Finally, its transformation of *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), into a device for limiting § 1983 to subsets of federal laws by the fiction of labelling actual rights as non-rights affects federal rights of every nature.

The petition for writ of certiorari should be granted. *

* Arizona strains to disqualify Justice O'Connor, asserting that "this controversy began in 1968" when she was an Arizona Assistant Attorney General and that her husband's then law partner testified as the State's expert witness in 1981 "on both the legal propriety of attorney's fees and the reasonableness of petitioners' fee application." Brief in Opposition, p. 13 n.4.

This controversy did not begin in 1968. When Pinetop Logging Company began logging for the Tribe in 1968, Pinetop's attorneys fully disclosed its activity to the Arizona tax authorities, who agreed Arizona could not tax Pinetop. This was evidenced in a letter of October 8, 1968, confirming the State's and Pinetop's "understanding that the *Warren Trading Post Company* case (85 S. Ct. 1242) applies and that the Sales and Use Tax Department has no jurisdiction over this operation, either as to sales tax on timbering or as to use tax on equipment brought into the Indian Reservation for this purpose." (Court of Appeals Excerpts of Record, p. 178.) Justice O'Connor resigned her position with the Attorney General's Office and became a member of the Arizona State Senate on October 30, 1969. This controversy arose in 1971, when Arizona levied the taxes it had earlier conceded it had no jurisdiction to assert.

Attorney Philip E. von Ammon testified as the State's expert witness on valuation of legal services, but Arizona did not challenge on appeal Judge Craig's findings of fact on the value of the legal services rendered, and they have been no part of this controversy after 1981.

Arizona now seeks to expand Mr. von Ammon's role to touch matters before this Court, asserting that he "was the State's expert witness on . . . the legal propriety of attorney's fees. . . ." Brief in Opposition, p. 13 n.4. This is neither correct nor relevant. Expert witnesses may not testify on legal questions but only to "assist the trier of fact." Rule 702, Fed. R. Evid.

If these circumstances were capable of tainting a judge's impartiality, they would only favor the State. But the Tribe and Pinetop are not objecting to Justice O'Connor's participation. The governing duty here is the duty to sit, which "is even stronger in the case of a Justice of the Supreme Court of the United States. There is no way of substituting Justices of this Court as one judge may be substituted for another in the district courts." *Laird v. Tatum*, 409 U.S. 824, 837 (1972) (Memorandum of Justice Rehnquist).

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